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THE LAW OF TORTS

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THE LAW OF TORTS

BY

MELVILLE MADISON BIGELOW

PH.D. HARVARD

SECOND EDITION

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PREFACE TO THE SECOND EDITION

THE author's aim has changed somewhat since the first edition of this work was published. The book was originally written for the beginner; it is now intended as well for the advanced student, whether in the Law School or at the Bar. Hence (1) the substitution of the more complete statement of General Doctrine at the beginning for the slight Introduction of the first edition, (2) an extension of the text generally, and (3) a larger working equipment of notes.

Some rearrangement too of chapters, or parts of chapters, has been found necessary either by recent decisions or by further experience in teaching. This is particularly true of the chapters dealing with interferences with Contract, and the long chapter on Negligence.

It is proper to repeat what was said in the Preface to the first edition, that 'The end in view is sought by presenting and considering three or four fundamental duties, in which are found the elements of the law of Torts. These are (1) the duty to refrain from fraud and malice, (2) certain "absolute" duties—duties, that is to say, independent of any real or nominal attitude of mind, and (3) the duty to refrain from negligence.'

These sets of duties, it may further be remarked, are distinct from each other; no one of them includes the others or either one of the others. It does not follow from the rule that a man is liable for harm done by fraud that he is liable for trespass though no harm may have been done, or that he is liable for negligence provided harm has been done. The

arrangement of the duties therefore cannot be one of strict, logical succession of greater and less or less and greater; but it does seem natural to begin with wrongs (of fraud and malice) which shock the moral sense; then to proceed to cases (of 'absolute' duty) which, the moral element being less conspicuous, require to be explained and perhaps justified; and then finally to cases in which the result of an act or omission is only an Event, that is, wrongs of Negligence. Such is the general theory of the arrangement of the subject of this book.

The present edition is based upon the seventh American edition.

M. M. B.

BOSTON, *May*, 1903.

NOTE.

Students beginning the subject with this book should pass by General Doctrine until they have mastered the Specific Torts.

TO MY FRIENDS

F. W. MAITLAND AND R. T. WRIGHT

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ERRATA.

In note 3, p. 22, *after* 2 K. B. 88, *add* 732.

In note 1, p. 65, *for* Denton v. Great Eastern Ry. Co. *read* Denton v. Great Northern Ry. Co.

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GENERAL DOCTRINE

THE LAW OF TORTS

GENERAL DOCTRINE

§ 1. LEGAL RIGHT: DOMAIN OF TORT

THE sphere of action of a citizen, in his relation to the law, is found in his legal rights, privileges in the sense of permissions, and duties. These legal rights, privileges, and duties constitute the relations which bind men together in the State, and so they form the law—the life-blood of the State¹. What a citizen may lawfully do is determined by his legal rights and privileges; what he must do is determined by his legal duties. These duties however correspond merely to the rights and privileges of others; hence a man's rights and privileges, limited as they are by like rights and privileges in others, juristically express the extent of his sphere of action as a citizen under municipal law. But it will be found important to consider duties independently, in any endeavour to state the law of torts; indeed it would be fairly out of the question to state the law adequately and clearly in terms of legal right.

¹ Conversely, law consists in these relations of legal right, privilege, and duty between men; binding men together, as they do, in the State. But it must not be supposed that the law books mention all our rights, privileges and duties. A man has a legal right to go to bed when he pleases, to get up when it suits him, to take exercise when he will, to live as a vegetarian if he prefers, to send for a physician if he must, to draw his will and prepare to die in his own way;—all these things and a thousand others, though no law book says so—enough that society could not exist if it were not so. Whatever is necessary to bind men together in the making of the State must be law.

It is of first importance then to get a clear conception of the meaning in law of right, privilege, and duty, as these terms are employed in the foregoing paragraph. The **Legal right explained.** general idea of the first, as it will be understood in this book, may be put thus: Legal rights ordinarily import positive powers¹, as a possession in hand with which to set the law in motion against one's neighbour upon occasion; in other words, legal rights ordinarily furnish ground upon which one man may have an action against another².

The term 'right' is however occasionally used in a broader, popular sense, even in law books. Thus, it is sometimes said that a person has a 'right' to do a particular thing, when it is only meant that it is not unlawful for him to do it. So too it may be said that a person had a 'right' to enter another's premises, when the fact is that he had no more than a permission to enter—that his entry could not be a trespass. Such uses of the term 'right' may be dismissed as only conventional, or as amounting to privilege. Much more may we pass by the common use of the word in such expressions as 'it is *right* to say' so-and-so.

In its more exact sense, as importing active powers, legal right, apart perhaps from a class of cases to be spoken of later, signifies the control or the authority of the will over some object tangible or intangible. When an object is not within the control or the authority of my will, as in the case of light and air, or the free fish in a stream though the stream run through my land, then (apart from the special cases) I have no right, in the legal sense, to or over that object. I may have a right in *respect* of it, as where I have a contract in virtue of which a house may sometime become mine, and for some special purposes in equity I may be considered to have a right over the house; but in the generally accepted and proper sense of the word I have no legal right to or over it. The house is not mine in whole or in part; my 'right' is over the vendor only.

¹ The rights conferred upon corporations are indeed commonly called powers. Rights often appear under the name of powers.

² Sometimes the infringement of a legal right may not give an action, as for instance infringement of the legal right of a person on trial for crime, before the petit jury, to have the prosecution carried forward to a verdict. But the law will always give effect to the right in some way.

In regard to legal right as above described, an object is within the control of my will when I have full power over it.

Control and authority in legal right. It may or may not be something in my hands or within my reach; enough still that there is nothing to prevent my exercising control over it at will, so far as any interference of others is concerned. An object is within the authority, as distinguished from the control, of my will when I am wrongfully deprived, in whole or in part, of my control over it without losing title to it, as for example when my horse is stolen or otherwise wrongfully taken or withheld from my proper control. And anything may be within the control or the authority of my will which is the means whereby I am to acquire legal rights. The means must be commensurate with the end. I have a legal right to a livelihood; hence I have a legal right to all reasonable means to obtain it; I have a legal right to a good name; I have a legal right to seek contracts, to enter into business, to pursue studies, to bring suits and prosecutions, to attach property,—to do or refrain from doing a thousand things suitable to the end of obtaining a livelihood.

In certain cases the judges have found it desirable to extend the meaning of the term 'right' beyond its more obvious and unstudied sense as above given; they have declared the existence of a class of legal rights over objects not fully and for all purposes within the control or the authority of one's will, the rights being such against wrongdoers only. Of

Extension of meaning of legal right: gratuity. this class are rights to the enjoyment of a gratuity, such as the benefit of a life insurance policy kept up on one's own life for one's sister, at the sole expense of the insured¹, or the benefit of another's gratuitous hospitality², or of a license. There may be other instances of legal rights of like or other special nature.

These special cases are explainable as resting upon sufficient grounds, even if they are not to be deemed as relating to objects virtually within the authority of the will. Of gratuities it is fair to say that towards one interfering, without just cause or excuse, in the enjoyment of a bounty by another,

¹ Lord v. Dall, 12 Mass. 115.

² Moore v. Meagher, 1 Taunt. 39; Williams v. Hill, 19 Wendell (New York), 305.

the bounty, as it is being received, is within the control of the will of the person receiving it, and towards the same person the continuance of the bounty, so far as it is likely to continue if unhindered, is within the authority of his will. On the whole it appears reasonable to say, of all this special class of cases, that the wrong consists in unjustifiable interference with the natural and proper exercise of the will; that is, that such exercise of the will, speaking generally, falls within the technical designation of legal right.

It should be remembered that legal right extends over the intangible as well as the tangible. An intangible object, such as reputation, may be within the control or authority of the will as much as a tangible object, such as property. I may keep or impair my good name at will; I may keep or barter away my 'good will' in business; I may or I may not permit another to defraud me to my hurt.

It is a corollary of the conception of legal right that legal rights are equal¹; one right is and must be as good as another, for any legal right will as well as any other sustain a suit or a defence. Any legal right upon which a man rests must in the given case prevail. It is not necessary or accurate therefore to say, as sometimes is said², that when a man sues on a stated claim of right, he must be answered by a 'superior' right. If a man sues upon a legal right, he must prevail, assuming his right, if he proves that that right has been infringed; and if it appears that his claim is answered by a defence of legal right, the plaintiff's claim is not, in reality, a claim of legal right. The defence of legal right shows that the plaintiff's apparent right was only a seeming. To say that there is a stand-off in such a case is not true, for the defendant will prevail—judgment will be given in his favour;

¹ This is the one truth, and the foundation, of the old but unhistorical contract theory of society, as maintained by Rousseau. But Hobbes made this same theory teach absolute monarchy; the people had contracted away their original rights. The earliest written statement of this fictitious theory of society is found in Plato's Republic. See Nettleship's Lectures thereon, pp. 52-57. The word νόμος combines the senses of 'law' and 'convention.' Id. p. 54, note.

² Read *v. Friendly Society of Stonemasons*, 1902, 2 K. B. 88, 96; *Walker v. Cronin*, 107 Mass. 555, 564.

he will prevail, not because he has a better right than the plaintiff has, but because the plaintiff, at least against the defendant, has no right at all. The very same facts might however constitute a legal right in favour of the plaintiff, if only the defendant had no legal right or permission to oppose to him¹.

It is proper now to inquire what rights are within the domain of the law of torts.

Rights are either of substantive or of procedural law. With procedural rights we are not concerned; this book treats only of substantive law, not of the machinery by which the law is enforced. Rights of substantive law (and indeed of procedural law, but not on the same lines), in accordance with a division and nomenclature adopted from the Roman law, are in *rem* or in *personam*. Rights in *rem* avail against all the world; rights in *personam*, only against certain defined or ascertainable persons. The typical example of a right in *rem* is a right of property; *proprio vigore*, that may be enforced against any one and every one whenever occasion arises. The typical example of a right in *personam* is a right of contract; that right—the contract right—can be enforced only between the parties to it and their successors. But just as one has the right to enter into contracts freely, so after a contract has been made each of the parties has a corresponding right that others shall not hinder the performance of it without just cause or excuse. It results that a right in *personam* *may* generate a right in *rem*. But the product, it should be noticed, is a very different thing from that which produces it.

¹ Another way of putting the same idea is to say that a man's rights contract or extend just as his neighbour's rights extend or contract, each affecting accordingly the territory of the other. Or in more common phrase, each man's rights are limited by the rights of all other men with whom he comes in contact.

This limitation of rights is an *effect* (though a necessary effect) of constituted society, not a cause or part of the constitution itself of society. The *making* of society is to be accounted for in the social instinct, in other words, as Plato put it, in the needs of men. 'What,' says Nettleship, speaking as Plato, 'is the general principle which produces human society? It is want in various forms. Society depends upon a double fact; the fact that no man is sufficient for himself (*αὐτάρκης*), and the complementary fact that other men want him.' Lectures on Plato's Republic, p. 71; see also *id.* pp. 163, 164.

The law of torts relates both to rights in rem and to rights in personam, though most torts are breaches of rights availing against all the world, that is, are breaches of rights in rem.

Another way of putting the division of rights will be found helpful, as serving to explain the origin as well as the nature of rights; and that is by saying that rights are

Rights paramount and rights consensual. paramount or consensual; the first kind designating those which exist independently of the will of individuals; the second, those which come into existence by consent, actual or presumptive.

Both classes alike, whichever way designated, create law, in the proper sense of that which, lying fast (*lex, legare*), binds men together¹; for law, as we have seen, consists merely in those relations (of right, privilege, and duty) between citizens which are deemed necessary or helpful to bind citizens together into the organism called the State. Hence both kinds of right are paramount in a sense; but the one kind exists originally and of its own efficacy and is universal, while the other is brought into existence, typically, by the agreement of two or more persons, and, generally speaking, governs them alone. Still, even with regard to the latter kind of rights, the judges have found it desirable to hold that the relations of the parties to the thing agreed upon are not in all respects consensual, in the sense that there can be no right or duty paramount to the will of the parties in the subject of agreement, a matter to which further attention will be called later on. The law of torts deals with both classes of rights; with the first class generally, with the second so far as the rights are treated as paramount to the will of the parties. In a word, the domain of the law of torts, so far as rights are concerned, lies in rights paramount, and hence tort, as a ground of action, consists in the breach of a right paramount, that is, of rights established by municipal law.

¹ Force by the State is not a part of the definition of law; it is only a concomitant of law, due to disobedience; men may obey the law, and generally do, though force is absent and unthought of.

§ 2. LEGAL PRIVILEGE

Privilege may indeed include legal right, as where it consists in special powers granted by law, of which riparian water privileges would be an example, or where it is absolute, of which exemption of a member of the Legislature from liability for words spoken in that capacity would be an example. In that sense it has been disposed of. But the term is also used, as we have already indicated, of mere permissions. In this sense it falls short of full legal right; towards the person granting it it is now purely negative in character; it does not furnish ground for an action against him¹. It imports protection, but protection from an action by the party who has conferred it, and not in the way of a ground of action against him. Towards third persons it may indeed confer a right of action, as in the case of a license to enter land, where entry is interrupted by a stranger². But we are not now concerned with the term in any of its aspects of legal right.

The conception of privilege thus set forth embraces permission of two kinds: first, permission 'by the party,' that is, by consent; and, secondly, permission 'by the law,' that is, permission paramount, since it is independent of the will of the person against whom it is granted. In either of these cases the privilege may or may not amount to legal right. In substance however it will always be found to amount to permission, under reasonable limits, to inflict harm upon another.

In the law books privilege in both senses is found under various designations. In the law of defamation it is called 'privileged communication'; in the law of trespass to property it is called 'license.' Often the word 'justification,' taken from the language of pleading, is used as a general, synonymous designation of the idea³.

¹ There are other cases of permission falling short of legal right. See *Earl Cowley v. Countess Cowley*, 1901, A. C. 450, Lord Macnaghten.

² Post, pp. 206-208.

³ 'Justification' may be of legal right, as in the case of self-defence or

It is important to understand the ground upon which privilege as permission rests; but nothing more than the general ground itself can be stated here. Privilege as mere permission must of course rest on terms; otherwise it would be 'absolute.' Upon what particular ground it rests in special cases, or in special classes of torts, can only be shown when the special subject arises in the 'Specific Torts' following this General part. The first class of cases of privilege, 'by the party,' calls for little comment here. The ground of exemption is consent, which is often expressed by a maxim adopted from the Roman law, 'volenti non fit injuria'—the man who consents to a wrong ('injuria') is barred of an action for it¹. Privilege 'by the law,' or privilege paramount, finds its origin either in duty or in interest², and therefore, unlike legal right, rests upon motive. It is of course limited accordingly.

Ground of privilege: motive of duty or interest.

Duty as a ground of privilege may be official or quasi-official, or only moral and hence of imperfect obligation. It requires no explanation to show that one must be protected from the necessary consequences, however harmful, of discharging a duty which one is expected to perform. A policeman making report to his superior, an officer serving process, a fireman endeavouring to put out a fire, must be exempt from liability for everything done in the discharge of his duty. The law could not be administered upon any other footing in the first and second of these cases; and in the third it would be difficult to find firemen to protect our homes if the law were otherwise than it is.

Official duty.

That privilege may also arise from moral duty is not so obvious; still the fact rests in principle as well as upon authority. The case springs in essence from an instinctive desire for the preservation of the race,

Moral duty.

defence of property, or it may be of mere permission, as in the case of license to enter land.

¹ Consent or want of consent has nothing to do with the case when the act or omission was lawful; and consent obtained by fraud is no consent in law. *Speight v. Oliviera*, 2 Stark. 493, as to the last statement.

² *Hebditch v. MacIlwaine*, 1894, 2 Q. B. 54, C. A.; *Harrison v. Bush*, 5 El. & B. 344; *Jenoure v. Delmege*, 1891, A. C. 73 (Privy Council); *Joannes v. Bennett*, 5 Allen (Mass.), 169.

a desire akin to that of self-preservation and equally well-founded. It is not directly necessary to put the case upon the ground of political prudence, which sees in it the welfare of the State, though that plainly is a consequence of the first ground, and is the final test of duty. I may well enter my neighbour's premises to rescue his beast from the mire; much more may I enter to save human life; to hold me responsible for harm done in the reasonable discharge of such a duty would be to find the existence of a relation between my neighbour and me which would tend to anything but to bind us together into the organism which we call the State. Where moral (or indeed official) duty shades into pure voluntarism, becoming impertinence, may often be a difficult question; but such considerations cannot avail against the existence of the immunity.

When it is said that privilege may grow out of interest, the word 'interest' must be taken in the sense, it seems, of
 'Interest,' of legal right, or something in the nature of legal
 what nature. right. I may have a duty towards my neighbour as my neighbour, from an instinct of humanity; but I have no interest in him simply as my neighbour, except perhaps the shadowy interest in his welfare as one of the multitude of men composing the State, and so sharing with me its burdens. The interest required must at all events rise higher than desire or even anxiety for another's general welfare¹.

§ 3. LEGAL DUTY

Legal duty should be considered, not only because of its natural relation to legal right, but because of the course of the
 Tort on the law. The law has had to look to infractions of
 side of duty. right, to wrongs or breaches of duty, more directly than to rights, as the word 'tort' itself implies². The law of torts has been worked out, not directly on the side of rights, not in terms even on the side of the violation of rights, but on the correlative side of duties.

¹ See *Shekell v. Jackson*, 10 Cushing (Mass.), 25.

² Latin *torquere, tortum*; to twist, a thing twisted, *distorted*, hence a wrong,—through Anglo-French; at first however only a colourless word.

Legal duty is created by the presence of legal rights; I owe legal duties to my neighbour in so far as I come or may come into contact with his legal rights. In some cases **Duty, how created.** this duty is self-evident and self-explanatory; in other cases explanation may be needed. A few words will make this clear:—

An act or an omission may, of itself, be a breach of legal duty, as where I enter another man's premises without his permission or the permission of the law, or where **Obvious breach of duty: acts or omissions of themselves.** in like manner I take possession of another man's property, or strike another man. In such cases the idea of legal duty needs no comment, unless it be to say that it makes no difference whether or not I know whose rights I am infringing, or that I have no thought of infringing any one's rights. I am not acting upon my own rights, or upon any permission, and I must therefore in a case of the kind be invading another's rights; that is to say, a legal duty rested upon me in the matter.

But the act or the omission may not, of itself, be a breach of legal duty; something else may be required to create liability. That that something else must not be **Acts or omissions which need to be supplemented.** brought about by the intention of the one who acts or omits is plain; the duty again is self-evident. There may however be a duty though the something else be brought about without intention. On what footing? The answer must be, on the ground that danger is observed or observable, and that the impending harm might be avoided.

Duty must always spring from facts which are observed or observable; to found liability on any other footing would be tyranny. It is not necessary that the facts should actually be observed; enough that they are such that a man of fair intelligence would observe them. **Observable facts and avoidable danger, the ground of duty.** Indeed legal duty does not always arise even when danger is observed—there are many cases in which it does not; but it is a condition in every case to the existence of a duty under the law that danger to another shall be observed or observable. And further still, if the impending harm cannot be avoided there will be no liability, unless the fact that the person on whom the duty is to rest was brought to the place of

danger by his own misconduct. If he was there by his own misconduct, it will not save him from liability that it is now too late for him to prevent the harm. The duty in such a case lies further back; it was infringed in the misconduct which led to danger. Assuming however that there was no misconduct, there can be no liability where harm cannot be prevented. Duty imports ability to perform it. There are indeed special cases in which a man may be liable for harm which he could not prevent, though he was free from misconduct in regard to the danger¹; but liability in such cases rests on the ground that safety should be insured because of the peculiar danger, rather than on that of duty in the ordinary sense.

Legal duty, like the converse or obverse legal right, is duty established by municipal law; the term 'legal' necessarily imports as much in both cases.

Duty in the foregoing remarks has been generalized in its broadest terms, for all kinds of tort. To attempt specific statement, by undertaking to say what kind of conduct one should observe, or refrain from, would be useless. Duty in the law of torts is of varying kinds, and there is no specific factor common to these various phases; what would constitute specific duty in one case would not constitute it in another. Still, the various kinds of duty involved in the different torts are capable of being grouped into some three classes.

**Division of
legal duties
in tort.**

In (what is to appear as) the first and second of the three classes the breach of legal duty is committed directly and at once, or provisionally, by a wrongful act; using the word 'act' in the sense of a thing done as the effect of psychic or mental process, that is, popularly speaking, in consciousness, with purpose, as distinguished from mere reflex or automatic action². The breach is 'direct and at once' where nothing remains to be done to complete it; it is 'provisional' where it

**How breach
of duty is
committed:
complete and
provisional
breaches.**

¹ Chap. xvi.

² Hence to speak of an 'intended act' is a pleonasm. An 'act' is necessarily intended, though its consequences may or may not be intended. See Ziehen, *Physiological Psychology*, 29 (London, 1892).

is not in itself complete, but requires something to be done by the other party. But in either case the thing complained of is always an act.

In the third class of cases the breach of duty is never completed by the misconduct alone; the breach is always provisional. The misconduct may consist in an act or an omission.

The difference between the first two and the third classes of cases, when the breach of duty, being by an act, is provisional, lies in the fact that the act in the first two classes looks directly forward to the resulting conduct of the other party and intends it; while in the third class the resulting conduct, even when preceded by an act, is only an Event, though involving liability by reason of the misconduct which caused it. Intention then is the distinguishing feature of the first two classes, and want of intention—now to be called negligence—of the third.

Now, in what may be taken as the first of the three classes of breach of duty, a lawful act is done either by wrongful means¹, or of malice; by 'means' being meant *measures* by which an act is done, by 'malice' a certain *state of mind* in which an act is done. In the second class the act done is in itself unlawful. In the third, what may, as we have seen, be called an Event has taken place, which event was caused by negligence. Shortly, the three classes may be put thus:

1. Lawful acts done by wrongful means or of malice.
2. Unlawful acts.
3. Events (loss) caused by negligence.

This division of torts, covering as it does the whole ground, will be followed in this book, as Part I., Part II., and Part III.²

Speaking of the first class of cases, it matters not what means may be employed, so long as the means are wrongful; such means will convert the lawful act either into an unlawful one or into one which the law will

¹ Note that 'wrongful means' imports something short of a tort; otherwise the case would belong to the head Unlawful Acts.

² For details see Specific Torts, and the statement following that heading, post,—following this General part.

not uphold. Thus if a man is induced to sell his horse by fraud, or by coercion, threats, or intimidation, what in itself is a rightful act, buying and taking the horse, has by reason of the wrongful means employed become a tort.

Of the several means by which a lawful act may be converted into one not lawful, fraud alone will be specially considered. In regard to other wrongful means it

Fraud. must suffice to name them—coercion, threats, intimidation, and the like; but fraud requires particular examination. Part I. will therefore be reduced to a consideration of the Duty to refrain from Fraud and Malice. Of fraud it should here be said that, while taken in a narrow sense the term imports only a state of mind, in its broader sense it imports means employed in a transaction, such as misrepresentation.

It should be observed indeed that fraud, malice, and negligence are all of them terms of special legal import,—that they do not necessarily signify in the law what they import in popular speech. The law declares, on the appearance of certain facts, that there is fraud, or malice, or negligence, whatever the popular meaning of the words. The law has its technical terms, and hence a dictionary of its own.

Fraud, malice, and negligence, as technical terms.

Fraud may be shortly disposed of, for the present purpose. The offence includes two classes of cases; one in which the person committing it is now dealing with the person upon whom it is committed, the other in which he is not. In the first class of cases the person defrauded is induced by the misrepresentations or other artifice of the wrongdoer to change his position to his hurt, whether by entering into new relations with the wrongdoer or in some other way. Here the two, personally or by agents, are face to face or are within touch by correspondence, and the wrongdoer holds out some deceptive inducement which is acted upon by the other. In the other class of cases the wrongdoer is seeking through some third person to circumvent the party to be wronged from enforcing his rights against him. The wrongdoer is putting his property out of his hands, for instance, to defraud the rights of his creditor or

Division of fraud: present sense of term.

creditors. The first of the two classes is then deception; the second, circumvention without deception.

The first of the two leads to an action for damages; the second does not in ordinary cases. The first alone is a tort; we are not concerned with the second. Only a word more need be said. Fraud in the sense in which we are concerned with the term is one of the elements of a specific tort called Deceit; in relation to which it has a definite, well-settled meaning. What that is will appear in the chapter relating to Deceit; hence it need not be considered here.

Malice is one of the most perplexing terms of the law, especially in relation to civil liability¹. It is continually used in different and conflicting senses. One thing however has always been agreed; unlike fraud, it does not import means, though it may be very closely related to means, so closely that the case may falsely appear to be one of malice² or of means³. Naturally and popularly malice imports motive, an evil motive or design, as of the very essence of the word. In law too the word is commonly used in a sense which makes it subjective, that is, a state of mind; but that does not necessarily make it a motive. It does sometimes *appear* to import motive in its relation to legal liability, as in the criminal law of murder, where the killing must be of 'malice aforethought,' that is, as the old precedents explain the expression, by an evil design or motive⁴. So too in cases of punitive damages, a survival of the time when tort was not yet fully discriminated from crime, the 'actual malice' required for such redress *appears* to denote motive⁵. But apart from the criminal law and its adjuncts, it seems that malice, even when called 'actual malice' or 'malice in the mind,' does not necessarily import

Malice: popular sense:
motive: subjective, in law, but not as motive.

¹ See the discussion in *Allen v. Flood*, 1898, A. C. 1.

² As where *A* does an act with intent to harm *B*, but in order to bring *B* to terms with him for some gainful purpose. The intent to harm is so dominant here that the case is likely to be looked upon as one of malice instead of means. See *Temperton v. Russell*, 1893, 1 Q. B. 715.

³ As perhaps in the case of conspiracy. See post, p. 108.

⁴ See Kenny, *Outlines of Criminal Law*, 124, 125, 132, 133, 139.

⁵ But the appearance in both of these cases is found mainly in the legal language of description, derived from the ancient precedents. See Kenny, 132.

motive. With the possible exception just named it will probably suffice for a case of malice, wherever it is necessary to prove malice, that the act in question was done with knowledge that it would do harm, or with knowledge that it would be unjust, or in reckless or wanton disregard of another's rights'. To prosecute a man with knowledge that there is no just cause of prosecution would be an example. Here is malice 'in the mind,' but not necessarily malice as an evil motive; one may well know that one's act will be mischievous without being actuated by the motive to inflict harm or to do injustice. A man may prosecute another without probable cause, in the hope of gaining a reward offered; a man may tell a wicked lie having as his sole motive the design to help a friend, indeed with regret that harm to any one should follow.

There is another sense too in which malice, as the law uses the term, may be subjective and yet still further removed from motive. To make *A* liable for interrupting a certain relation between *B* and *C*, as for instance that of master and servant, it is necessary to prove that *A* knew of the existence of the relation. Then, with such knowledge, interrupting the relation, he is said to have done the act 'maliciously'; he has done it with malice in the mind because he has done it with knowledge of the relation. Here however it is plain that malice is or may be quite emptied of its natural meaning.

In this last case malice as an entity is reduced to its lowest terms; more than that, it is an inappropriate and misleading name for doing certain acts with notice of certain relations as a necessary condition merely to a breach of duty. From such cases it is but a step to cases in which the doing of certain acts is called malicious though no relation with others, of which there must be notice, exists, as in slander and libel.

The explanation of the use of the term 'malice' in these as well as in the foregoing cases is probably to be found in the historical connection, already referred to, of the criminal law with the law of torts. That is, the term was probably carried

¹ *Allen v. Flood*, 1898, A. C. 1; *Wren v. Weild*, L. R. 4 Q. B. 734, 736; *Gott v. Pulsifer*, 122 Mass. 235.

on from the language of the criminal law, where it appeared to have an appropriate use, to the law of torts in the course of the emergence of that subject as a separate branch of law; where it was retained without regard to its inappropriateness to questions of civil liability¹. Malice thus becomes, at last, a mere name of a legal conclusion, a name of nothing requiring proof; it is simply 'malice in law' or 'implied malice,' that is, it is a downright fiction.

Connection of tort with criminal law, as to malice.

To sum up: Malice, as an entity, in the eye of the law, like malice in popular speech, is a subjective fact. As such it may import (1) motive exceptionally, or (2) recklessness, or knowledge that an act will be mischievous, or (3) nothing more than knowledge or notice of the existence of some special relation which is interrupted. In the first case malice makes perhaps a true head in the law; but its place is in criminal and quasi-criminal jurisprudence. There is no other place for malice in the sense of an evil *motive*, as a necessary element of liability. In the second case it is an old term in civil liability. In the third case, the word having completely lost its natural meaning has no just claim to a place in the law of malice. The facts which constitute it prove merely the existence of a duty by such as have the knowledge or the notice. There is nothing distinctive of malice in that; for, as we have seen, to create a duty there must be observable danger; if danger could not be seen or foreseen—hence if the relation in question was not known—there could be no duty. As for malice which is not an entity at all, but only a fiction, there is, a fortiori, no place for the troublesome term in any classification of subjects of the law.

It comes then to this, that malice in civil liability has a place in virtue of the legal extension of its popular meaning to cases of doing certain kinds of harm recklessly or with knowledge that such acts are harmful or unjust. In certain cases then malice in that sense makes an element in the cause

¹ There is ground for distinguishing homicide from murder, by describing the latter as a killing with malice aforethought. Kenny, *Outlines of Criminal Law*, 125. But to transfer the term 'malice' to liability in tort, without discrimination, was to create endless confusion.

Summary of division of malice as an element in liability.

of action. But it is still true that malice in the sense of an evil motive will also help to make a cause of action in the same cases; and that fact, which at first appears perplexing, calls for explanation¹.

The explanation is probably to be found in the fact that the acts complained of in the cases referred to are privileged, as that term has already been explained. They are not true acts of legal right; they fall short so far that they are only permissions². The chief example is malicious prosecution, already referred to. The term is only a title; the wrong for which an action lies is a malicious prosecution begun without reasonable or probable cause. These facts (together with the termination of the prosecution) must be proved by the plaintiff. Now it is clear that no man has a legal right to prosecute another without reasonable or probable cause. A man *may* do so, as we have seen; no action can be maintained against him for so doing. But that is all there is of it; the person so prosecuting is merely exempt from liability—probably that men may not be discouraged from resorting to the courts to settle their disputes.

That the matter does not rise above the level of permission to that of legal right, may readily be shown. Suppose that by false and fraudulent representations, whether by the person intended to be prosecuted or another, a civil prosecution, without reasonable or probable cause, is put off until it is barred by the Statute of Limitations; could an action be maintained for the fraud? Clearly not, for as there was no ground for the intended prosecution there could be no damage; and no other kind of action would fare any better. The intended prosecutor therefore had no legal right to prosecute; indeed it would be absurd to speak of a legal right to prosecute where there is no cause of action, and none the less because it may have been honestly supposed that there was a well-founded claim.

The explanation then of the fact that a plaintiff in a suit for malicious prosecution makes a case by proving (with other

¹ The *evidence* will usually be objective, that is, external to the mind, as where excessive zeal in prosecuting is shown; but the evidence is offered to prove malice in the mind.

² Compare *Earl Cowley v. Countess Cowley*, 1901, A. C. 450.

facts) that the prosecution was begun with malice as an evil motive, or with malice in any other subjective sense, is that proof of the kind merely overturns a permission or privilege. The permission or privilege rests in all cases, as we have seen, on the motive of interest or of duty,—in this case that the prosecution is brought with design to protect a proper interest of the prosecutor, or in the discharge of duty. If then the design was to harm the party prosecuted, in other words if the suit was brought with an evil motive towards him, it is not within the permission or privilege. And clearly there could be no privilege of the kind in question when the prosecution was begun in reckless or wanton disregard of the defendant's rights; the privilege must have been acted upon reasonably and in good faith¹.

The case therefore is not one in which legal right, or, to use the more common term, a rightful act, is converted into a legal wrong by proof that the right was exercised with an evil motive; and the same may be said of malice in any other purely subjective form.

Slander of title, so called, an action for false and malicious disparagement of property, is also a case in which the dis-

**Same subject;
slander of
title.** paraging statements are simply permitted or privileged². *A* may falsely declare that *B* has no title to a certain piece of land claimed by *B*, or make other false statements concerning *B*'s property, real or personal; no action could be maintained against him for the statements, though *B* suffered damage by them, any more than if in the same sort of case *A* had brought suit to recover the land. But that is not because *A* had a legal right to do such a

¹ Compare the language of Lord Halsbury in *Earl Cowley v. Countess Cowley*, 1901, A. C. 450, 453, where there was no more than a permission (to use a title of nobility).

² *Wren v. Weild*, L. R. 4 Q. B. 730; *Halsey v. Brotherhood*, 19 Ch. D. 386; *Gott v. Pulsifer*, 122 Mass. 235, 238. But it should be noticed that the privilege in slander of title and in malicious prosecution is not the substantive privilege (set up in pleading) of slander and libel. It is not brought out except by inference in the pleadings or evidence. The language of the cases should not be misunderstood. In slander and libel, privilege is set up after the plaintiff has made a *prima facie* case; in slander of title the plaintiff has to overturn, in the first instance, what we have in the text spoken of as privilege,—which is privilege, not in the technical sense, but only in the sense that false words disparaging property are *permitted* if they were not malicious.

thing; the law simply *permits* him. He could not maintain a suit against one who, by using means of a wrongful nature, prevented him from doing the thing, as by tearing up scattered notices or hand-bills making the false statements. But *A* is permitted to make the false statements unless *B* shows that he made them maliciously (to his damage). The malice however would be shown by proof that *A* knew the statements to be false or made them in reckless disregard of *B*'s rights¹; that would overthrow the permission. Belief by *A*, on the other hand, in the truth of the statements, would be a defence if a *prima facie* case were made against him; and it seems to follow that malice in the sense of motive would be irrelevant to such a defence, whatever might be said of it if offered in evidence at the outset to make a *prima facie* cause of action.

There is nothing then in either of the subjects considered, from which it can be inferred that malice, in the sense of **Same: slan- motive, can overturn legal right, so as to give to der and libel. motive a place in the classification of civil wrongs.** In slander and libel, malice lies still further afield; it has nothing whatever to do as an entity, in any sense, with making a *prima facie* case. The plaintiff here does not have to overturn any privilege in advance; it is only when the defendant has set up a privilege and given evidence in support of the same that the plaintiff has anything to do but to prove the publication. Then, by proving malice, he cuts away the foundation of the alleged privilege; and all that he need prove in the way of malice is that the defendant published the charge knowing that it was false², or in reckless disregard of rights³. Fraud then in its more familiar aspect in tort, and even negligence, are to a certain extent interchangeable terms with malice, though malice, in the sense of motive, is not interchangeable with them. 'Nullum simile est idem.'

There is, finally, no authority now on the common law that

¹ Wren *v.* Weild, and Gott *v.* Pulsifer, *supra*.

² See Wren *v.* Weild, L. R. 4 Q. B. 734, 736, Blackburn, J.; Green *v.* Button, 2 Crompt. M. & R. 707; which were cases of slander of title.

³ Gott *v.* Pulsifer, 122 Mass. 235, slander of title.

malice, in any merely subjective sense, in acts otherwise done of legal right, is entitled to a place in the classification of civil wrongs, and the contrary may be laid down as accepted doctrine¹. Conversely, it is equally true that an act which is wrong or wrongful² cannot be shown to have been done as of a right or justified by evidence that it was done from a good motive; and so of omissions or conduct of whatever kind³. There has never been any question of this converse doctrine.

So much for Part I.

In Part II., breach of duty by Unlawful Acts, we come to a class of cases in which, though there is often a manifest intention on the part of the defendant to do the very thing

¹ The following cases may be mentioned: *Quinn v. Leathem*, 1901, A. C. 495; *Allen v. Flood*, 1898, A. C. 1; *Bradford v. Pickles*, 1895, A. C. 587, affirming 1895, 1 Ch. 145; *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25 (that the motive 'of benefiting the defendant at the expense of the plaintiff' is not malicious or unlawful, overruling on that point *Bowen v. Hall*, 6 Q. B. Div. 333, 338, Lord Esher); *Chasemore v. Richards*, 7 H. L. Cas. 349, 288; *Heald v. Carey*, 11 C. B. 977, 993; *Stevenson v. Newnham*, 13 C. B. 285, 297.

In *Allen v. Flood*, supra, the House of Lords overrules emphatic dicta in *Temperton v. Russell*, 1893, 1 Q. B. 715, C. A., reaffirms *Mogul Steamship Co. v. McGregor*, ut supra, and accordingly reverses *Flood v. Jackson*, 1895, 1 Q. B. 21. The case (*Allen v. Flood*) was twice argued in the House of Lords, ten other judges being called in, on the second argument, for advice. Against the advice of a majority of those judges the House of Lords held the plaintiffs not entitled to recover, though their own judgment was not unanimous. But the importance of the case, at first supposed to be very great, has been diminished by *Quinn v. Leathem*, supra, which practically reduces it to an authoritative declaration that an act which is in itself lawful, though causing harm, does not become unlawful by being done with a bad motive.

The Roman law took cognizance of malice as a motive, at least in regard to the use of land; and so does the modern Civil or Roman law. Digest 39, 3, 1, §§ 12-17; Bigelow's L. C. Torts, 515, 516, 525. See *Sweet v. Cutts*, 50 New Hampshire, 439; *Bassett v. Salisbury Manuf. Co.*, 43 New Hampshire, 569; *Graham v. St. Charles R. Co.*, 27 L. R. A. 416 (Louisiana).

Malice in relation to particular torts will be considered as the torts are reached, in Parts I. and II.

² 'Wrongful' applied to an act or omission does not necessarily import that the act or omission is a tort. It may import as much, or only that the act or omission is of an unlawful nature, requiring something else to make it a tort. False representation is an illustration.

³ *Bradford v. Pickles*, 1895, A. C. 587, 594, 598; *Read v. Friendly Society of Stonemasons*, 1902, 2 K. B. 88 (want of bad motives no justification); *Hooper v. Truscott*, 2 Bing. N. C. 457.

for which he has been sued, the law ordinarily takes no account of his motive or state of mind, supposed or actual, or of the means employed, so far as the right of action is concerned. The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question, e.g. by fraud or in malice, though it often happens that one or other of these things is present. Nor is negligence, or the want of negligence, any necessary part of the case.

Here then is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have caused loss) is unlawful and redressible as a tort. The cases in which this is true are, speaking generally, cases of procuring breach of contract, enticing away and seduction¹, slander and libel, violence apparently about to be committed², or actually committed, upon one's person³, restraint of liberty⁴, interfering in one way or another with the possession⁵, ownership⁶, or enjoyment⁷ of property, and failing to keep safely dangerous animals and dangerous things; and perhaps other cases.

We come now to Part III. From regarding, first, a mental attitude of the defendant, and secondly, disregarding the existence or non-existence of such an attitude, the law now passes over to cases in which it regards, as an essential fact, what at first looks like a negative mental attitude. In the class of cases now reached, the law takes account of the fact that the defendant has not directed proper attention to danger attending some act or omission of his, or, if he has, that he has not conducted himself as he ought to have done, in the situation. He has failed, e.g. to exercise due care; and the failure, assuming damage to have followed,

¹ These two cases are cases of malice only in the sense of doing the act with notice of a special relation; which amounts only to showing a duty. See *ante*, p. 17.

² Assault.

³ Battery.

⁴ False imprisonment.

⁵ Trespass to lands or goods.

⁶ Conversion, 'trover' in the old law, a wrong relating to goods.

⁷ E.g. nuisance.

constitutes a tort. This phase of the breach of duty is the domain of negligence¹.

The net result may then be shortly put as follows: Looking to one class of cases, a tort consists in a breach of duty committed by wrongful means (such as fraud), or of malice. Looking to a second class, a tort consists in a breach of duty absolute, regardless of wrongful means, malice, or negligence. Looking to a third class, a tort consists in a breach of duty committed by negligence.

Further, it must be observed that, whatever the duty, it must be a duty to a person complaining of the breach of it.

Duty to whom. *A* may have been guilty of conduct which is a breach of his duty to *B*, but not of his duty to *C*, however much *C* may have suffered by reason of it. Or it may be a case in which *A* might have owed a duty to *C* but for the fact that *C* has relieved him of it. And it is permissible for one man to exempt another from his duty to him in a particular case when the act or the omission is not a violation of the criminal law.

The duty in question, as we have seen, is established by municipal law. This will serve to distinguish tort from contract; for in contract the duty is commonly fixed by the parties, in the terms of the agreement. But that is not always the case; it happens not infrequently that the parties to a contract leave terms to be supplied by the evidence of custom or by the law itself. In such cases a violation of the term so to be supplied might make a case of tort or of breach of contract, at the election of the injured party; the duty being fixed by law, or, what would come to much the same thing, by custom,

¹ The law does not, in point of fact, stop to consider the actual state of mind of the defendant as a ground of liability in actions for negligence; the text only says that negligence 'at first looks like a negative mental attitude.' It may be helpful still to notice, that there is always in fact, to some extent, a negative or passive state of mind in cases of negligence; the mind has not been duly aroused to the danger, or if the defendant is sensible of the situation, he has not duly exerted himself to avoid harm. But the test is applied to the manifestation; the question is, not what was the defendant's state of mind, but what did he do or omit?

the duty would be paramount, and hence the breach could be treated as a tort. Thus, if a common carrier at Liverpool were to contract with *A* to deliver at York wheat put into the carrier's hands, and fail to do so, he would be presumptively liable to *A*, as for a tort, or for breach of contract, at *A*'s election.

Breach of an implied term of a contract may then, it seems, be treated as constituting a tort whenever the term is supplied by law or by custom; but that is not a matter of much importance in ordinary cases; the question is only one of the preferable remedy. Still, it is to be remembered that in theory the law of torts overlaps that of contract at the place indicated.

It is not to be inferred that there cannot be a tort in respect of the breach of a contract the terms of which are all fully expressed. If the contract contain a false warranty, it is broken in the breach of the warranty; and breach of an affirmative warranty¹, fraudulently made, may be treated as a tort. So too, what is of much importance, a contract founded upon a false and fraudulent representation, though not amounting to a warranty, may be repudiated, and an action for tort maintained; or the contract may be treated by the injured party as binding, and an action for tort brought to recover damages for the loss caused by getting him into the contract. The explanation is, that the breach of duty sued upon is not in reality a term, expressed or implied, of the contract; the duty violated is fixed by law,—a duty not to defraud. In this view then the law of tort still further overlaps that of contract.

§ 4. DAMAGE

We have seen that tort gives rise to a suit for damages. But that does not necessarily imply that the plaintiff must have sustained some loss or detriment. Like

A technical term. 'fraud,' 'damage' is a technical term. There are many cases in which the defendant would not be allowed to

¹ A warranty affirming a fact, as distinguished from one promising something.

show that the plaintiff had not suffered a pennyworth. On the other hand, there are many cases in which the plaintiff cannot recover judgment without proving that the act or the omission of the defendant caused a loss to him.

Loss in the sense of actual harm or prejudice is called in the law special damage, though the term 'special damage' is sometimes used in the sense of a particular kind of loss¹. The contrasting term is implied or legal damage; this imports a mere violation of what may be called an absolute legal right. Speaking broadly, the cases in which it is not necessary to prove special damage in an action for tort are cases in which the act done is manifestly dangerous, so much so that instinct calls at once for redress and would take it but for the law. Rights of life, liberty, property², and reputation furnish the subjects of such redress. Attempts upon life, whether to take life or not; restraint of liberty; interfering with property; assailing one's good name; such acts call for redress without regard to the question of loss. One would instinctively seek redress in such cases; and the law only sanctions, what it must in some way always sanction, instinct. If one had to endure acts of the kind not causing loss, one would be constantly at the mercy of lawless men. For the specific cases to which these remarks apply, the 'Statement of the duty' at the head of the several chapters should be consulted, where the presence or absence of the word 'damage,' there used in the sense of loss or special damage, will give the desired information.

To constitute damage in the sense of loss or special damage, it appears, by the current of authority, to be necessary that something more than mental suffering, or a shock to the nerves alone, without 'impact,' though followed by sickness, should have been caused³. A workman on a house might negligently let a stick fall at

¹ *Ratcliffe v. Evans*, 1892, 2 Q. B. 524, 528, Bowen, L. J.

² According to the Roman law, damage is necessary in case of wrongs to property. See Dig. 9, 2, 27, §§ 17, 25-28; Grubeber, *Lex Aquilia*, pp. 233-235.

³ *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222; *Spade v. Lynn R. Co.*, 168 Mass. 285; s. c. 172 Mass. 488; *Terwilliger v. Wands*, 17 New York, 54, 63; *Wilson v. Goit*, *id.* 442. The doctrine rests partly on the ground

my feet, as I was passing along the street, and if, though startled, I was not hit, the workman probably would not be liable for the act¹; but if he threw the stick at me, with the same result, he would be liable, for passion would instinctively be aroused to redress. But rather inconsistently, mental distress may be considered as an element in damages in any case where a right of action is shown regardless of such distress².

Finally, the fact that a tort is redressible in damages serves to distinguish the wrong from a crime; which is redressed by

Tort distinguished from crime. prosecution on behalf of the public for the purpose of punishing the accused, by imprisonment, fine, or forfeiture. But most crimes attended with loss may also be treated as torts. Homicide is an exception, apart from cases falling within statute. It will be seen then that the law of torts, which we have found overlapping the law of contracts on one side, overlaps on the other the criminal law. But the greater part by far of the domain of tort lies between the two extremes.

In explanation of the examples given throughout the general text following, it is to be observed that when a particular act or omission under consideration is said to be a 'breach of duty,' or of 'legal duty,' or of the 'duty under consideration,' it is assumed that other elements of liability, if there be such, are present. Further, 'breach of duty' or the like implies a right of action in damages. And the term 'damage,' standing alone, is generally used in the text, as well as in the 'Statement of the duty,' in the sense of 'special damage,' actual loss. The 'Statement of the duty,' it may be added, is intended to suggest a *prima facie* case.

of the difficulty of getting at the truth, partly on the ground that mental suffering is very much a matter of individual temperament and susceptibility, in other words that the effect is not sufficiently uniform to make it natural and probable—it is 'remote.'

¹ Compare *Victorian Rys. Comm'rs v. Coultas*, *supra*, fright upon danger of collision with a railway train.

² See *Harvard Law Review*, January, 1894, p. 304; *Spade v. Lynn R. Co.*, 168 Mass. 285, 290; s. c. 172 Mass. 488, 490.

§ 5. DEFINITION OF TORT

Having in mind what has been said in the preceding sections as constituting the substance of a tort, a definition of the term may now be given. To attempt a definition which would tell its own story on its face would be hopeless. Indeed no definition, helped out however much by explanation, can convey an adequate notion of the meaning of the word; nothing short of careful study of the specific torts of the law will answer, for there is no such thing as a typical tort, an actual tort, that is to say, which contains all the elements entering into the rest. One tort is as perfect as another; and each tort differs from the others in its legal constituents. But they all have this in common, that there must be a breach of duty paramount, or, as we shall now put it, established by municipal law; and they all lead to an action for damages. These facts must furnish our definition. Accordingly a tort may be said to be, *a breach of duty established by municipal law for which a suit for damages can be maintained*; or, conversely, *the infringement of a private right, or a public as a private right, established by municipal law*.

This work deals, not with tortious conduct broadly, which may touch subjects as far apart as breach of contract and the impeachment of public officers, nor with prospective and imminent torts, but with torts themselves, in the sense of the definition—actions for damage for breach of the kind of duty named.

§ 6. PERSONAL RELATION, OR STATUS, ETC.

What has gone before relates to the law of torts in what may be called its primary manifestation,—in other words, between citizen and citizen as such. But that does not exhaust the subject; it remains to consider the subject as affected by the fact of a person's standing in some special relation to his fellows, or

Diversity in
torts: com-
mon factor.

Special mani-
festation of
duty.

of being subject to some incapacity before the law, or of occupying some special relation to one who is the immediate wrongdoer. Thus a person sought to be held liable for a tort may at the time of the wrong alleged have been holding some post of state, such as a judicial position, or he may have been under some disqualification or incapacity, putting him below the level of a full citizen, as where he was insane or under age, or he may have been an employer of the person immediately guilty. Nothing yet set forth shows what the standing of such persons would be in an action against them for tort. How does the particular situation of a citizen affect the question of his liability?

In regard to persons holding under the State, executive, legislative, or judicial position, the answer is a simple one; the case is one ordinarily of absolute privilege, and might have been considered under the head of privilege except that it was thought best to confine the subject there to primary relations, or citizen and citizen, in accordance with the treatment of right. No action for damages can be maintained against a person for anything said or done, for example, in the discharge of judicial duty, except it be an action for false imprisonment; no action for fraud, for malice, for trespass (except imprisonment), for conversion, for negligence, or for anything else in consequence of judicial action; and so of things said or done by the executive or of a member of the legislature.

Because, apparently, of the tender regard which the courts have always felt constrained to show towards liberty, actions in certain cases are maintainable against magistrates who have caused the imprisonment of men without just process. This is not the place to consider what is necessary to make a case against a judge on such grounds; to point out the liability is all that is now called for. The subject will be considered in its proper place¹.

The ground of the immunity of the executive branch of government², of legislators, and of judges is plain. The places

¹ Chapter ix.

² *Spalding v. Vilas*, 161 U. S. 483. See *Chatterton v. Secretary of State*, 1895, 2 Q. B. 189.

occupied by such persons are the great departments of the State, and the State could not carry on its functions if those set over its departments could be haled before the courts at the suit of every person aggrieved by their action.

In regard to competency or capacity, it is to be observed that the breach of duty may be committed by any one having
Capacity: natural capacity¹. The law of tort affords a
criminal law, strong contrast in this particular both to the law
fraud, malice, of contracts and to the criminal law. Liability
and negli- in contract depends, it is true, upon capacity to
gence. contract; but want of such capacity may be either natural or artificial (legal). One must be of sound mind and at least twenty-one years of age to bind one's self by contract². Liability under the criminal law depends also upon the existence of capacity to commit crime; but want of this too may be natural or artificial. A person must be of sound mind and at least seven years of age to be subject to punishment under the criminal law³.

There may be difficulty sometimes in applying the rule of natural capacity, but the difficulty can seldom arise except in
Infants and cases requiring proof of fraud, malice, or negli-
insane gence, and then, generally speaking, only in suits
persons. against infants. Where the doing of the act creates, of itself, liability,—that is, where there is a breach of the absolute duty,—a defence of incapacity would be manifestly contrary to the fact, and could not, it seems, be allowed. The fact that the person was of unsound mind or a child of tender years would not be material. It would be enough that the act was done of the will, uncompelled⁴.

¹ The law in regard to married women has been so much changed by statute that no attempt will be made to consider it.

² Contracts for necessities make an exception.

³ Kenny, *Outlines of Criminal Law*, 50.

⁴ Is a madman liable in damages for the consequences of an act otherwise wrongful which was done, though intentionally, in an uncontrollable frenzy? Or suppose that A threatens to kill B unless B will trespass upon C's land, and B does the act; will it affect the case that B is an infant, insane, or idiotic? By the Roman, contrary to the English law, a lunatic was not liable for damage done to property, any more than if a tile had fallen and done harm (without any one's fault). 'Et ideo quærimus, si furiosus damnum dederit, an legis

Cases requiring proof of fraud, malice, or negligence would perhaps create no difficulty where the defendant was a person so unsound of mind as not to be accountable to the criminal law; an action of tort could hardly be maintained. A madman may, indeed, be guilty of fraud or malice in some sense (cunning, it is well known, is a common trait of the insane), but not in the sense in which it would be necessary to create liability, as e.g. in an action for deceit or for malicious prosecution¹. And clearly a madman cannot exercise diligence². A person sane enough to be accountable to the criminal law would probably be liable for any kind of tort.

Infancy is more likely to give occasion for serious difficulty. An infant of sound mind twenty years of age, or much less, is liable for any tort for which an adult might be sued; an infant of five years could seldom be liable in damages for negligence, and of course would never be sued for torts requiring proof of fraud or malice. But within these extremes there is a region of uncertainty, in which the courts, if called upon to act, must act according to the best light they may have in each particular case; the question of capacity being a question of fact³.

There is a difficulty of another kind touching the liability of infants and of persons of unsound mind, namely, where what would be a tort in other cases, as for example a fraudulent representation, is the inducement to a contract. But the rule in regard to such cases is that there can be no liability in

Aquilæ actio sit? Et Pegasus negavit; quæ enim in eo culpa sit cum suæ mentis non sit? Et hoc est verissimum. Cessabit igitur Aquilæ actio quemadmodum...si tegula ceciderit. Dig. 9, 2, 5, § 2; Lex Aquilia, fr. 5, § 2.

¹ Compare *Emmens v. Pottle*, 16 Q. B. Div. 354, 356, Lord Esher.

² Whoever is incapable of *diligentia* cannot be charged with *negligentia*. Wharton, *Negligence*, § 87, on the Roman law. See *Harvard Law Review*, May, 1896, p. 65.

³ The Roman law in regard to damage to property was more precise; it distinguished between children under seven years, and those between seven and fourteen, and children over fourteen. 'Si infans [under seven] *damnum dederit*, idem erit dicendum [sc. *furiosus*, supra, p. 30, note], quodsi impubes [between seven and fourteen] id fecerit, Labeo ait, quia furti tenetur teneri et Aquilia eum; et hoc puto [Ulpian] verum, si sit iam *iuriæ capax*.' Dig. 9, 2, 5, § 2; Lex Aquilia, fr. 5, § 2. Children over fourteen were liable generally for injuries. Grueber, *Lex Aquilia*, p. 14. The contention sometimes maintained in regard to English law that infants are liable only for absolute torts like trespass or conversion, and not for torts like deceit, has not found favour.

tort if to enforce an action of the kind would virtually fix upon the incompetent party liability for breach of contract¹. The case is or may be quite different where the tort follows, but is not caused by the contract; to enforce an action for tort in such a case would not be to enforce a contract, as for example to compel an infant to make good the loss of a horse which he has borrowed and then directly abused and killed².

It should not be supposed to follow that persons under disability can, in virtue of their disability, retain whatever they may have become possessed of by wrongful conduct. The meaning of the law is only that no liability actually or virtually by way of contract can be created against such persons. Infants have been compelled to surrender premises obtained under lease by them, through fraudulent representations that they were of full age, upon the ground that an infant shall not take advantage of his own fraud to keep his ill-gotten booty. He must restore what he has obtained by fraud, if he has it and will not carry out his bargain³. But cases of this kind, not being actions for damage, do not fall within the scope of this book.

Allied to the class of cases of persons under disability, so far as right is concerned, are corporations. These are fictitious persons, and when created by statute have no powers or rights but those conferred by the statute; and since statutes seldom if ever confer upon corporations all the powers or rights of citizens, it follows that such corporations are more or less under disability. And the fact that a corporation is a fictitious person has been looked upon as a serious obstacle to holding such a body liable (except in the case of a corporation sole) for torts in which mental attitude has or seems to have place in a cause of action, and in very early times for torts of any kind⁴; which of course

¹ Fairhurst v. Liverpool Loan Assoc., 9 Ex. 422, infancy.

² Burnard v. Haggis, 14 C. B. n. s. 45.

³ Lemprière v. Lange, L. R. 12 Ch. 675.

⁴ Abrath v. Northeastern Ry. Co., 11 App. Cas. 247, 250, remarks of Lord Bramwell, but not followed in Cornford v. Carlton Bank, 1900, 1 Q. B. 22; s. c. 1899, 1 Q. B. 392. 'The difficulty felt in earlier times was one,' it is said, 'purely of process; not that a corporation was metaphysically incapable of

disregarded the fact that those composing the corporation were human beings, for they were not the corporation.

But this technical piece of rationalizing has mostly given way, and it is now probably general doctrine that the fact that what would be a tort in the case of an individual was done or omitted by a corporation, makes no difference. That is, though not having all the rights of individuals, corporations must still respect the rights of individuals,—their duties are measured by the rights of those with whom they come into contact. Thus a corporation committing torts by fraud or of malice¹ is liable for the same as clearly as for torts committed by negligence; a corporation is liable also for assault, false imprisonment, and probably for all kinds of torts. An exception has been thought proper in favour of charitable corporations, on the ground that where funds have been given to a body incorporated for such public purpose they should not be diverted to pay for damages for the torts of its agents or servants, where due care has been taken in selecting its men²; but the exception has been rejected³.

It is obvious that disability in the way of immunity from liability for acts or omissions does not of itself involve diminution

Incapacity no abridgment of rights. of rights; nothing but alienage or the commission of crime works abridgment of rights, so far as the subject of rights of action is concerned. All persons (except criminals undergoing punishment, and aliens), whatever their incapacity to incur liability, may sue for tort

doing wrong, but that it was not physically amenable to *capias* or exigent. 22 Ass. 100, pl. 67, and other authorities.' Pollock, Torts, 58, 6th ed., citing Serjeant Manning's note to *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452.

¹ See e.g. *Smith v. Land & House Corp.*, 28 Ch. Div. 7 (deceit); *Cornford v. Carlton Bank*, 1900, 1 Q. B. 22; s. c. 1899, 1 Q. B. 392 (malicious prosecution); *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25. In *Comerford v. West End Ry. Co.*, 164 Mass. 13, doubt is raised whether a corporation is liable for slander or libel by its servants or agents in the course of their employment, unless the act was authorized or adopted by the corporation. But it may be doubted whether this distinction is well taken.

² *Heriot's Hospital v. Ross*, 12 Clark & F. 507, 513, dictum of Lord Cottenham.

³ *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93. In America there is a conflict of authority. *Downs v. Harper Hospital*, 101 Mich. 555, supports Lord Cottenham's dictum, while *McDonald v. Massachusetts Hospital*, 120 Mass. 432, is contra. There are other American cases.

and the disability of criminals and of aliens to sue has nearly become a thing of the past under enlightened legislation.

The next personal relation to be considered is master and servant, where a tort has been committed by or through the servant. By the term 'servant' appears to be meant one who, being strictly subordinate to and dependent upon the will of his employer within the terms of the employment, does not make, or rather is not engaged to make, contracts for his employer¹. Such a person, when engaged in a lawful employment, and acting as a servant and at the same time not 'wilfully' in the sense of purposely or knowingly participating with his employer in wrongdoing, is not liable for the consequences of his acts or omissions as torts. 'Respondeat superior.'

There is no anomaly in this, for it may well be that the wrongfulness of what has been done or omitted depends upon knowledge or means of knowledge possessed only by the master. In such a case, there being on the part of the servant nothing to suggest harm or danger, he does not see that any one's rights are being or are likely to be infringed, and hence he cannot be guilty of any breach of duty. The contrary will of course be true where the servant, though acting under command, understands, or ought from facts known to him to understand, that the rights of others will be infringed, and yet executes his orders.

As regards the liability of the servant, then, the case is normal, falling in with the general doctrine of rights and duties. It is very different as regards the liability of the master; his liability lies outside anything that has gone before in this consideration of the law of torts. The observability of harm or danger, from facts at hand, or facts one ought to know, is, as we have seen, the basis of duty; but a master may be liable for the torts of his servant, though to *him*

¹ When one is employed to make contracts for the employer, thus bringing about a new relation, the case deserves another name, and has it in 'agency.' A person may be my servant for general purposes, as for instance my coachman, and yet directly my agent, as when I send him to purchase new furnishings for my carriage or to have the carriage painted; he would still be *called* a servant, though exercising exceptionally the function of an agent.

(the master) there was no ground for apprehending harm; he may have been a thousand miles away—enough that the servant's act or omission was in the course and within the scope of his employment, even though contrary to the master's own orders.

Various attempts have been made by judges and writers to account for this doctrine, but it must be said that they have not been very successful. Sometimes it has been said that there is an implied command for every act of the servant in the service of his master¹; but that is only another way of saying that the act is in law authorized, which is true, but is no explanation of the case. It has also been said that the master has put the servant in the master's place to do the master's work, or to do the class of things embraced in the particular case². But this also, if in less degree, is unsatisfactory; and so of most other reasons given in the books. The one ground which cannot be disputed, and probably is the true one, is that the judges have on the whole concluded that, in the interests of the State, or on what is often called public policy, it is best that the master should be liable.

But the master is liable only when the servant was at the time acting within the scope of his employment, which appears to mean acting for the master³; and as has already been intimated, a servant may be acting for his master, so as to fix upon the master liability for tort, though the servant was at the time violating his master's plain orders. Thus I may send my servant with horse and wagon on an errand to a certain town, and tell him that he must not go by a certain road because it is in a dangerous condition: but if in the course of the errand he goes by that road, and while in it injures someone by negligent or even by wilfully bad driving, I am liable.

There was some question formerly whether a master could be held for what were called 'wilful' torts by his servant, though committed on behalf of the master; but the doubt has

¹ Blackstone, i. 417.

² Bayley *v.* Manchester R. Co., L. R. 7 C. P. 415; Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; British Banking Co. *v.* Charnwood Ry. Co., 18 Q. B. Div. 714, 718.

³ British Banking Co. *v.* Charnwood Ry. Co., 18 Q. B. Div. 714 (agency).

disappeared, and the master would now be held liable. Thus, if a servant of a railway company should commit an assault upon a passenger in a train, in the course of his employment and not in consequence of something outside of the same, the railway company would be liable¹.

The moment the servant ceases to act for his master, though still remaining in the service, the master's liability ceases, and does not arise again until the servant begins once more to act for him². Thus, if after starting out upon an errand for his master, the servant should turn aside for purposes of his own or another's, as if he should go off to make a purchase for himself or for some friend, or if he should go to see a game of ball, the master could not be held for torts committed by him while so doing³.

The doctrine which imposes liability upon the master is a general one, applying as well to cases of slander and libel, malicious prosecution⁴, and other torts⁵, as to cases of negligence and trespass.

Closely allied to master and servant, for the purposes under consideration, is the relation of principal and agent. It is sometimes put as a distinction between the two **Principal and agent.** relations, that a servant can exercise no independent discretion, but is subject at all times to the control and direction of his master, while an agent acts largely upon his own discretion; but the distinction will not bear examination. So far as there is a difference in the matter of discretion between the two relations, it is a difference of kind, not a difference between the absence and the existence of discretion. A servant must frequently exercise a very wide and important discretion, especially when his master is beyond reach. A servant employed to drive a stage-coach or an electric car has

¹ See *Bayley v. Manchester, Sheffield, &c. Ry. Co.*, L. R. 7 C. P. 415.

² See *Rayner v. Mitchell*, 2 C. P. D. 357, as to the servant's re-entering upon his service.

³ See *Storey v. Ashton*, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, 2 C. P. D. 357; *Mitchell v. Crasweller*, 13 C. B. 237.

⁴ *Vance v. Erie Ry. Co.*, 32 New Jersey, 334.

⁵ *Davison v. Duncan*, 7 El. & B. 229 (defamation); *Smith v. Land & House Corp.*, 28 Ch. D. 7 (misrepresentation).

the care of human lives committed to him, and their safety will depend very much upon the exercise of his own discretion¹; and on the other hand even the simplest kind of service involves the exercise of discretion, otherwise a stupid servant would be as useful as a bright one. The master cannot be present all the time to direct his servant.

The real difference is in the kind of discretion to be exercised; an agent in the full sense, while, like a servant, subordinate to and not independent of his employer, is employed to make contracts for his principal². That makes a fundamental difference; but it does not bring about any special result in regard to the principal's liability for his agent's torts. The liability of a principal is the same as that of a master, whatever the tort. And the limits of liability are the same; a principal, like a master, is liable for his agent's torts only when his agent is acting for him, not when the agent is acting for himself, even though doing something which he might have done for his principal³.

To the general rule by which a principal is held liable for the torts of his agent committed on his behalf, a single exception has sometimes been made, to wit, that an innocent principal should not be liable for the fraudulent misrepresentations of his agent, which as a matter of fact were not authorized, though they were made in the course and within the scope of the agent's employment⁴. This appears to rest upon the ground that the general rule imposing liability upon one who, morally speaking, is guiltless is exceptional and harsh. Such a rule, it may be thought, should not be extended to a new class of cases not necessarily within it, except upon grounds of urgent public policy. The tendency of the

See French

¹ 'That the proper management of the boilers and machinery of a steamboat requires skill must be admitted. Indeed, by the Act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it.' *New World v. King*, 16 Howard (U. S.), 469.

² There are 'agents,' so called, who have no authority to make contracts for their employers; the text will cover these as well as agents in the full sense of the term.

³ *British Banking Co. v. Charnwood Ry. Co.*, 18 Q. B. D. 714.

⁴ *Western Bank v. Addie*, L. R. 1 H. L. Sc. 145. The principal is 'innocent' in the double sense of not in fact having authorized the representation, and not knowing or having reason to know that it was false.

authorities however has been steadily in the contrary direction, towards rejecting the exception and holding the principal liable¹. All no doubt would agree that if the principal derived a benefit from his agent's fraud, without offering to return it upon discovering the deception practised, he would be liable.

For the torts committed by one of two or more servants to the damage of a fellow servant, the master is not liable, **Fellow unless statute makes him liable. Cases of the servants.** kind seldom arise except in negligence, and hence the rule is commonly justified in terms relating to negligence. The servant, in entering the service, assumes, legally speaking, the risk of everything which is incidental to the employment, and this is declared to include the negligence of a fellow servant². But the exemption from liability is not, it seems, limited to cases of negligence; the employer, whether a master or a principal, probably is not liable at common law for damage wrongfully done by one servant or agent to his fellow in the course of the business, whatever the nature of the tort, whether of negligence, fraud, malice, or anything else.

The doctrine that the servant assumes the risk of negligence on the part of his fellows is not then broad enough, even if it were not, what it appears to be, an arbitrary doctrine, generally untrue in point of fact. It would be still less true to say that a servant assumes the risk of torts in general by his fellows. The truth appears to be that, without resorting to fiction, a servant stands in a different position towards his master from that of a stranger. This may be seen by supposing the case of a man's children, who in law are his servants, or of a man's domestic servants; the idea that one of these could sue the master for torts of another of them would be revolting. The case of non-domestic servants differs only in degree, and the degree of difference must be considerable to justify an alteration of the common law even in cases of negligence; much more so in other cases. Masters furnish the means of support for servants, and hence should

¹ *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259 (Ex. Ch.); *Mackay v. Commercial Bank*, L. R. 5 P. C. 394.

² *Post*, chap. on Negligence.

not be liable to their servants unless *they* have done them wrong. The relation is beneficent towards the more dependent classes, and should not be discouraged.

The relation of servant or agent is one of strict dependence upon the authority of the employer; it is on that footing that the latter is liable. When the employment does **independent contractors.** not create dependence, when the person employed is, in the conduct of the employment, independent of the person engaging him, when in a word he is what is called in the books an 'independent contractor,' the employer is not liable for the torts of such contractor¹; unless the misconduct of the contractor was itself also a breach of duty owed by the employer, as where there was a vice in the very undertaking². Thus if I enter into contract with a builder to erect a house for me, or to make over a factory into a house, he alone will be liable to others, until I resume control, for torts committed in the course of the work, notwithstanding the fact that the work is done for me. And so in turn if he should employ an independent sub-contractor for part of the work, such as putting in the gas fittings, such sub-contractor, and not the chief contractor, much less the first employer, will be liable for torts committed in performing the sub-contract, until he turns over his work to the principal contractor³.

The qualifications to this doctrine, as has been indicated, are found in cases in which the employer owed some duty to others regardless of the 'independent contract,' which that contract does not relieve him of. Thus the owner of premises owes the duty to others not to maintain, or allow to be maintained, a nuisance upon his premises, and if in consequence of a contract with another a nuisance is created there, the owner will not escape liability because the person immediately guilty of causing it is an independent contractor.

The same would be true if the thing authorized to be done

¹ *Brown v. Accrington Cotton Co.*, 3 H. & C. 511; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335; post, chap. on Negligence, § 10.

² *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 341, 352; *Penny v. Wimbledon District Council*, 1893, 2 Q. B. 72, C. A.; post, pp. 335, 336.

³ *Rapson v. Cubitt*, 9 M. & W. 710; *Overton v. Freeman*, 11 C. B. 867; *Murray v. Currie*, L. R. 6 C. P. 24, 27, Willes, J.

by the contract were wholly illegal, or wholly without the sanction of law, as if a town, having no authority to lay gas pipes through its roads, should contract with a person to lay such pipes, and some one should be injured by nuisance, trespass, or negligence on the part of that person, in the work¹. And the like would be true of cases in which a private corporation having special duties towards the general public, as in the case of a railway company, should employ an independent contractor to do work for it in premises which the company was bound to have in fit condition for business of the public; in such a case the railway company could not delegate or otherwise get rid of its own duty to the public². Liability in such cases, it should be noticed, is not confined to negligence.

§ 7. LEGAL CAUSE: CONTRIBUTORY FAULT

The defendant's misconduct must have been the legal cause, or part of the legal cause, of that of which the plaintiff complains, to enable the plaintiff to recover judgment. Having regard to the defendant and third persons, it need not be the sole cause; it matters not that others helped the matter along, so far as the right of the injured person to sue any one (as well as all of them) is concerned. But considering only the person injured and the defendant, the defendant's conduct must have been the sole cause of complaint; if the plaintiff's own conduct made part of the cause of action, he cannot recover.

In such a case the defendant has violated no duty to the plaintiff, whatever duty he may have owed; it is the plaintiff and the defendant together who have done or omitted the thing complained of. And whatever might be said in favour of separating the conduct of the defendant from that of the plaintiff, where the plaintiff's conduct was not the sole cause of the injury, the courts generally have looked upon it as

¹ *Ellis v. Sheffield Gas Co.*, 2 El. & B. 767.

² *Holmes v. Northeastern Ry. Co.*, L. R. 4 Ex. 254; *Smith v. London Docks Co.*, L. R. 3 C. P. 326.

unwise, if not impracticable, to attempt to administer the law in that way.

The courts however are very careful to distinguish mere conditions from legal causes¹. In a certain sense of the word 'cause,' the plaintiff cannot but be part at least of the cause of his misfortune, for unless he or his property was where he or it was at the time in question, no harm could have befallen him, and that of course whether his own conduct in the matter was wrongful or not. But that is not the conception of cause which the courts have adopted; the courts distinguish, as was just stated, between things or situations which are but conditions necessary to the happening of any misfortune, and things or situations which in themselves have the plain promise of misfortune. A result is, legally speaking, caused when it happens as the natural effect of that which brings it to pass; the case is this, that standing with knowledge or what should be accounted knowledge of certain facts, harm is likely to follow in natural course. Hence there can be no breach of duty by the defendant when, in such a case, the plaintiff himself does or omits to do the thing which, though in necessary connection with the defendant's misconduct, is likely to produce the harm.

On the other hand, if what the plaintiff has done or omitted was not likely to produce the harm, or any harm at all, his doing or omitting is no more than a condition to the result, and the defendant *has* violated his duty to the plaintiff. He alone, considering none but the plaintiff and the defendant, has caused the damage².

The doctrine in question is obviously a general one, applying to all torts. As a matter of fact however it is seldom called into service except in cases of negligence; there almost exclusively it has found its development, and there it has special phases that will require particular examination when the subject of negligence is reached. The reader is accordingly referred to the chapter on Negligence for further information.

¹ See e.g. *Newcomb v. Boston Protective Department*, 146 Mass. 596, which dwells upon the distinction.

² The case is a phase of the maxim '*causa proxima, non remota, spectatur*,' considered in the next section.

§ 8. TERMINATION OF LIABILITY

Liability for tort having been incurred, how far does it extend? For it is obvious that a train of unfortunate results may follow. The general answer to the question, though scarcely an answer at all until explained, is that a man is liable for all such consequences of his torts, as, legally speaking, he has caused. This answer is often put in terms of a maxim or rule of the Roman law, adopted into our jurisprudence; '*causa proxima, non remota, spectatur*,'—the law regards the 'proximate,' not the 'remote' cause.

With reference to this maxim, nothing could be more misleading than to take it in its plain, primary sense; in that sense the law as often regards the 'remote' and disregards the 'proximate' cause, as it does the contrary. *A* tosses a lighted squib into one of the booths of a market, and *B*, the owner of the booth, instinctively throws it out and it falls into the booth of *C*, who repeats the instinctive act, but now the squib strikes *D* in the face and puts out his eye. *C* obviously is nearest, or 'proximate' in the primary sense, to *D*, and *A* is most 'remote' of all; and yet *A* is liable to *D*, and *C* probably is not; *A* is liable whether *C* is or is not, supposing that *C* has acted instinctively and not of purpose, negligence, or other wrongful conduct towards *D*¹. It is obvious that the maxim is to be taken in some metaphysical sense; *B* and *C* must be regarded as machines, and the final result as happening in the natural course of things.

'Results happening in the natural course of things' is the more common way of putting the case; a tort having been committed, the wrongdoer is liable for whatever happens in the natural course of things, having regard to the time when the tort was committed. The rule does not mean, broadly, that liability extends to whatever occurs in the course of nature; it means what occurs in the course of things natural or probable when

**Causa
proxima,
non remota,
spectatur.**

**'Natural
course of
things' at
outset.**

¹ *Scott v. Shepherd*, 2 W. Black. 392.

the wrongful conduct took place. Thus a person who, in violation of law, should start a fire in the highway would be liable for damage done by any spread of the fire in the condition of the atmosphere when the fire was started, or while it was still under control; but not perhaps for damage produced by a hurricane or tempest suddenly and unexpectedly arising.

On the other hand, it is not necessary that the *particular* mischief resulting should have been foreseen or regarded as

**Actual result
need not have
been foreseen.** probable. A person who sets a fire wrongfully, or does not properly guard a fire which he sets, in a dry stubble in midsummer, is liable for damage

done by its spread, under the observable conditions of the air at first prevailing, even in case the fire should unexpectedly cross broad fields and extend to buildings or haystacks beyond¹. In like manner one who wrongfully sets a fire or unlawfully allows a fire to get under way among timbers floating down a stream, the burning timbers finally causing the destruction of property several miles below, is liable for the loss; he has in the legal sense caused the loss, however improbable it may have been, because it happened in the natural course of things understood. So again one who unlawfully strikes another will be liable, it seems, for what ensues naturally from the known state of things in the person struck, though the result appears to be out of proportion to the blow, though probably not for consequences due, with the blow, to some occult and unknown disease².

It is enough in all such cases that the wrongdoer knows, or is bound to know from the facts of which he is aware,

**Liability for
consequences
turns on duty.** that harm will follow, or is likely to follow, his improper act or omission in the understood state of things. The conditions to the harm which follows are before him; danger is observable. This is again

¹ *Smith v. Southwestern Ry. Co.*, L. R. 5 C. P. 98; 6 C. P. 14 (Ex. Ch.).

² See *Stewart v. Ripon*, 38 Wisconsin, 584, and compare *Sharp v. Powell*, L. R. 7 C. P. 258. For other cases involving the general principle, see *Vandenburg v. Truax*, 4 Denio (New York), 464; *McDonald v. Snelling*, 14 Allen (Mass.), 290 (defendant negligently running into a team and causing the horses to run away and collide with plaintiff's sleigh); *Farrant v. Barnes*, 11 C. B. N. S. 553.

returning to language used in speaking of duty. Duty exists where (harm being avoidable) danger, either directly or through facts which the defendant knows or ought to know, is observable¹. It must follow that duty lasts to, and includes all results flowing naturally or probably from, the defendant's wrongful act or omission; duty equally must end at, and exclude, results which happen out of natural course, as things were known to exist. And liability must end where duty ends; the plaintiff can have no right towards which there is no correlative duty. The doctrine of duty then, rightly understood, determines both the creation and the termination of liability.

This way of putting the case, which is now the usual way, puts aside the persistent doctrine or dogma that a man intends the natural and probable consequences of his conduct. The statement is not only unnecessary, **Intending the natural consequences.** it is untrue in most cases. The notion appears to spring from an idea that liability for the consequences of conduct depends upon intention to bring the consequences to pass; for which there is no authority. There will of course be intention, since every psychic act or omission, as we have seen, necessarily implies intention. But the resulting breach of duty and infringement of right (where the act or omission was wrongful) may not have been in the mind at all, that is, may not have been intended; and it has never been supposed to be necessary to say that the result is intended where it follows closely upon the act or omission. Liability arises in the case because the misconduct caused the breach. So in these other cases, where the misfortune is further off in time or space. The question simply is, whether the defendant's conduct caused the harm. The dogma in question confuses acts and omissions with their effect.

There is, or may be, special difficulty where the train of events instead of going on in nature, or through human beings acting mechanically, extends through the acts of **Intermediate human agency.** men conducting themselves freely and without constraint. In such cases it appears to be

¹ *McDowall v. Great Western Ry. Co.* 1902, 1 K. B. 618.

necessary that the intermediate human agencies should act in accordance with the purpose, or with what might reasonably have been expected from the conduct, of the one further back who set the train in motion. The connection between the sufferer and such person would be broken if some one, or some force of nature, between them were to act in the matter 'out of course,' that is, in a way not to be expected; the wrongdoer can owe no duty to a person who sustains damage from the wrong, unless in natural or probable course.

But if the intermediate persons, few or many, act in accordance with the purpose, or with what might reasonably have been expected from the conduct, of the one back of them, though they be not his agents or his servants, he will be liable for damage done, not because the acts of the intermediate persons are in fact his acts, but because he has, legally speaking, caused the damage. He owed a duty to the person who should ultimately fulfil his purpose or act as might have been expected. And that duty has been violated¹.

The principle in question applies generally to all kinds of tort, but as a matter of fact it seldom finds expression except in cases of negligence; some phases of it are almost of necessity phases of negligence. The consequence is that the subject must be considered particularly under that head, and it will not be considered further here².

§ 9. DEATH OF PLAINTIFF OR DEFENDANT

Liability for tort may come to an end in a very different way from any capable of being stated in terms of the cessation

**Rule of actio
personalis:
origin doubt-
ful: modifica-
tions.**

of duty; 'actio personalis moritur cum persona.' Expressing the rule in terms of the Roman law, the courts have from early times declared that (most) torts cease, with the death of either of

¹ *Lynch v. Nurdin*, 1 Q. B. 29; 55 R. R. 191; *Engelhart v. Farrant*, 1897, 1 Q. B. 240; *McDowall v. Great Western Ry. Co.* 1902, 1 K. B. 618; cases of trespassing known to be probable.

² See post, pp. 335—337.

the parties to them, to carry liability¹. Both the origin and the justification of this rule are matter of doubt; but no common law rule has been more steadily maintained, except as statute has affected it. It matters not that an action may already have been set on foot², the rule applies with absolute impartiality.

It has been suggested that the rule may have come into operation when the processes of the courts were finally putting aside the right of private redress for wrongs which had prevailed under what may be called customary law. 'A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man's estate³.' Whether this be true or not of cases of the death of the wrongdoer,—it would not explain the effect of death by the injured person⁴,—reasons were found even in early times which brought about legislation to limit any possible application of the rule to cases in which the tort directly affected the injured man's property. Legislation of the kind began as early as the year 1330, which gave an action for 'goods and chattels of . . . testators carried away in their life'; and twenty-one years later the same right of action was given, by construction of statute, to administrators⁵. Statutes have been added in favour of the nearest kindred of persons killed by misconduct of others. The latter statutes, however, have no place in a consideration of General Doctrine.

¹ See e.g. *Bowker v. Evans*, 15 Q. B. Div. 565, death of plaintiff. The rule is not confined to torts. The action for breach of promise of marriage '*moritur cum persona*.' *Finlay v. Chirney*, 20 Q. B. Div. 494. Aliter, if special damage to property is caused.

² *Bowker v. Evans*, *supra*, an arbitration.

³ Pollock, *Torts*, 61, 6th ed., to which is added a dictum by Newton, C. J., from Year Book 19 Hen. 6, pl. 10 (A.D. 1440-1): 'If one doth a trespass to me and dieth, the action is dead also, because it should be inconvenient to recover against one who was not party to the wrong.'

⁴ By the Roman law there was no action for damages for the killing '*quia in homine libero nulla corporis aestimatio fieri potest*.' Dig. 9, 3, 1, § 5. This has sometimes been asserted to be the reason for the English rule.

⁵ 4 Edw. 3, c. 7; 25 Edw. 3, st. 5, c. 5. See *Phillips v. Homfray*, 24 Ch. Div. 439. The Roman law went further than the English, being without limitation. '*Est enim certissima iuris regula ex maleficiis poenales actiones in heredem non transire nec dari solere veluti furti, vi bonorum raptorum, injuriarum, damni injuriarum*.' Gaius, iv. 112; Inst. iv. 12, 1; Dig. 47, 1, 1 pr.; Dig. 50, 17, 111, § 1.

§ 10. ASSIGNABILITY OF ACTIONS FOR TORT

Actions for tort, not harmful to property, are not assignable¹. Various reasons have been given, the common one being that such actions are peculiarly personal. **Ground of rule.** How, it may be asked, can another represent one whose good name has been tarnished, or whose happiness has been ruined²? Perhaps the explanation runs back to the time when torts had not yet detached themselves from crimes. Crimes of course were always personal; torts continued, after the separation, to be regarded as of the same nature, except where damage was done to property. It may also be noticed that things which are not descendable, such as actions for tort³, are not ordinarily alienable. Actions for tort however which harm property, as they survive, are assignable⁴. So too, it seems, are *judgments* in damages for tort⁵.

¹ Howard *v.* Crowther, 8 M. & W. 601; Drake *v.* Beckham, 11 M. & W. 315, 319, in Ex. Ch. Accordingly the right to file a bill in equity for a fraud is not assignable. Prosser *v.* Edmonds, 1 Y. & C. 481. Compare Lex Aquilia, fr. 11, § 7; Grueber, pp. 38, 39.

² See Howard *v.* Crowther, *supra*, per Lord Abinger.

³ *Supra*, p. 49.

⁴ Howard *v.* Crowther, *supra*.

⁵ Benson *v.* Flower, Sir W. Jones, 215; Ex parte, Charles, 14 East, 197; Buss *v.* Gilbert, 2 M. & S. 70; Rice *v.* Stone, 1 Allen (Mass.), 566.

SPECIFIC TORTS

[The shading of one topic into another is the ground of specific arrangement. In Part I. Deceit shades off into Slander of Title, and thus into Malice. Malice in turn shades off into the first of the topics of Part II., Unlawful Acts. These last shade into the topic of Part III., Negligence.]

PART I

LAWFUL ACTS DONE BY WRONGFUL MEANS OR OF MALICE

BREACH OF DUTY TO REFRAIN FROM FRAUD OR MALICE

CHAPTER I

1. *Lawful Acts done by Wrongful Means: Fraud*

DECEIT

Statement of the duty. *A* owes to *B* the duty not to mislead him to his damage by false and fraudulent representations.

Deceit may be a ground of defence to the enforcement of a contract, and also a ground for proceedings by the injured party to rescind a contract. In such cases the same facts, apart from the wrongdoer's knowledge of the actual state of things, are necessary for establishing the deceit as are necessary to an action of or for deceit. Hence, with the exception mentioned, authorities concerning the proof of deceit in cases of contract are authorities in regard to actions for damages by reason of deceit.

The action at law for damages by reason of deceit is called indifferently an action *of* deceit or an action *for* deceit.

§ 1. WHAT MUST BE PROVED

In order to establish a breach of the duty above stated, and to entitle *B* to civil redress therefor, *B*, unless he come within one of the qualifications to the rule, must make it appear to the court (1) that *A* has made a false representation of material facts; (2) that *A* made the same with knowledge of its falsity; (3) that *B* was ignorant of its falsity, and believed it to be true; (4) that it was made with intent that it should be acted upon by *B*; (5) that it was acted upon by *B* to his damage¹. Proof of

¹ *Pasley v. Freeman*, 3 T. R. 51.

such facts, whether or not in a relation of contract brought on by *A* with *B* by the false representation, or of trust, or of benefit obtained or sought by *A*, makes a cause of action¹.

But each of the general elements just stated, of the right of redress, must be separately examined and explained, and the qualifications to the same presented. The designation of the parties as *A* and *B* may now be dropped, and *B* will be spoken of as the plaintiff, and *A* as the defendant; and so in all coming chapters.

§ 2. THE REPRESENTATION

It is proper first to consider the meaning, in the law, of the term 'representation,' and thus to ascertain the real foundation of the action under consideration.

Definition.

Accordingly, a representation may be defined to be a statement or an act, creating a clear impression of fact upon the mind of another, sufficient to influence the conduct of a man of ordinary intelligence.

As a mere matter of the form of language, there may be no difference whatever between a representation and a warranty.

Representation distinguished from warranty.

The statement 'This horse is sound' may be the one or the other. The following external distinctions however will suggest certain tests for deciding cases to which they are applicable: A warranty is always annexed to some contract and is part of that contract; the warranty is indeed a contract itself², though a subsidiary one, dependent upon the main agreement. A representation however is in no case more than inducement to a contract; it is never part of one. To carry it into a contract would be to make it a warranty. And again, there may be a representation, such as the law will take cognizance of, though no contract was made or attempted between the

¹ *Pasley v. Freeman*, 3 T. R. 51. Until this case was decided (1789) it was not clear that an action of deceit could be maintained where, between the parties, there was no relation of contract, trust or the like. *Grose, J.*, dissenting, considered that the authorities furnished no support for such an action. The decision of the court has been followed on both sides of the Atlantic.

² *Brownlie v. Campbell*, 5 App. Cas. 925, 953, Lord Blackburn. An affirmative warranty is ordinarily an artificial contract of the law.

one who made the representation and the one to whom it was made.

This would be sufficient to distinguish the two terms, if it were necessary to a warranty that it should be expressly annexed to the contract-in-chief; but that is not necessary, and that fact sometimes creates difficulty. In written contracts there can seldom be difficulty in determining whether a particular statement is a warranty or a representation (when it is either), for the warranty must be part of the writing, since a warranty must be part of the contract-in-chief¹, and it will either be directly incorporated into the general writing, or be so connected with it by apt language², that there can be no doubt of the intention of the parties.

The difficulty is with oral contracts, and then in most cases only in regard to sales of personalty. Whether the statement in question is a representation or a warranty is however treated as a question of intention³; and an intention to create a warranty is shown, it seems, by evidence of material statements of fact made as an inducement to the sale, at the time the bargain was effected, or during negotiations therefor which have been completed in proper reliance upon the statements⁴; provided nothing at variance with the inference of intention is shown⁵. If the statement was not so made, it is a representation if it is anything. What difficulty remains is in the application of the rule; and that is a matter for works treating of contracts or warranty in detail.

Warranty treated as representation.	A warranty of fact however, when broken, may be treated, it seems, as a case of misrepresentation, giving rise to an action for deceit, if the elements necessary to liability in a proper case of misrepresentation are present; and this, it is believed, is true
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¹ *Kain v. Old*, 2 B. & C. 627.

² A warranty may indeed be implied, i.e. arise without language or intention, but such cases are aside from the present purpose. The difficulty under consideration concerns the effect of language used.

³ There may be no intention, in point of actual fact, to create a warranty; but intention may be inferred beyond dispute by what was said or done. It is therefore more properly a question of the interpretation or meaning of words or conduct than of intention in the sense of what was in the mind.

⁴ See *Hopkins v. Tanqueray*, 15 C. B. 130.

⁵ Such appears to be the effect of the cases. See Benjamin, Sales, § 613.

whether the warranty was express or implied. Under the system of pleading which prevailed before the Judiciary Acts this would have reduced the matter to a question of the form of action. But it is still doubtful whether an action based on deceit could be maintained where the evidence showed nothing but a breach of warranty. That would, in the language of the old pleading, be a variance; the action should be on the warranty as such¹.

Consider now the definition above given of the term 'representation.' A representation must consist in 'a statement or an act.' There are, it is true, cases in which legal consequences may attend absolute silence; but there are very few cases² in which an action for damages on account of silence alone can be maintained. There must ordinarily be some additional element to make silence actionable. If the silence consists in withholding part of the truth of a statement, it may be actionable, as will be seen later; but in such a case silence is, properly speaking, only part of the representation, for the representation must include all that it reasonably imports. The silence amounts to saying that what has been stated is all. There is a duty to speak in such a case, and it is only when there is such a duty that silence has any legal significance.

Indeed, even passive concealment, that is, intentional withholding of information, when not attended with any active conduct tending to mislead, is insufficient to create a cause of action. For example: The defendant, knowing of the existence of facts tending to enhance the price of tobacco, of which facts the plaintiff is ignorant to the defendant's knowledge, buys a quantity of tobacco of the plaintiff at current prices, withholding information of the facts referred to (no question being asked to bring them out). This is no breach of duty to the

¹ See *Collen v. Wright*, 8 El. & B. 647; *Randell v. Trimen*, 18 C. B. 786; *Seton v. Lafone*, 18 Q. B. D. 139, affirmed on appeal, 19 Q. B. D. 68.

² Silence might be ground for an action for damages by a cestui que trust against his trustee, in a transaction between the two in regard to the trust property.

plaintiff¹. Again: The defendant buys of the plaintiff land in which there is a mine, the defendant knowing the fact, and knowing that the plaintiff is ignorant of it. The defendant does not disclose the fact in the negotiations for the purchase. This is no breach of duty².

An act however, attending what would otherwise be a case of perfect silence, in regard to the fact in question, may have the effect to create a representation, and lay the foundation, so far, for an action³; but the act must be significant and misleading⁴. For that purpose however it may be slight⁵; a nod of the head may no doubt be enough, so may a withdrawing of attention from some point to which it is being or about to be directed.

But as has just been said, the act attending the silence must be significant and misleading, or it will count for nothing. For example: The plaintiff sues the defendant for damages caused by the sale to him by the defendant of animals having a contagious disease. Statute prohibits the sending of such animals to market, and imposes a penalty for violating the prohibition. The animals in question have however been inspected by the public officer and passed before the sale. The seller has made a written statement that the animals must be taken 'with all faults,' and that no warranty is made and no compensation for defects will be given. These facts do not show any representation by the defendant that the animals are not affected with disease, or create any right to damages in favour of the plaintiff⁶; though it is possible that the case might have been different had there been no such statement by the seller as that mentioned⁷.

¹ Laidlaw v. Organ, 2 Wheaton, 178. See Smith v. Hughes, L. R. 6 Q. B. 597; Evans v. Carrington, 2 De G. F. & J. 481; Peek v. Gurney, L. R. 9 H. L. 377, Lord Cairns; Coaks v. Boswell, 11 App. Cas. 232, Lord Selborne. 'Whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.' Blackburn, J., in Smith v. Hughes, supra.

² Fox v. Mackreth, 2 Bro. C. C. 400, 420, a leading case in equity. See Turner v. Harvey, Jacob, 169, 178, Lord Eldon.

³ Laidlaw v. Organ, supra.

⁴ Id.

⁵ Turner v. Harvey, Jacob, at p. 178.

⁶ Ward v. Hobbs, 4 App. Cas. 13, affirming 3 Q. B. Div. 150.

⁷ See Badger v. Nichols, 28 L. T. N. S. 441, Blackburn, J., referred to by Lord Cairns in Ward v. Hobbs, but apparently with doubt.

To make a representation, the statement or act must create a 'clear impression'; the plaintiff does not make out the alleged breach of duty if his evidence shows **Clear impression.** only a statement or act of vague or indefinite import. Such statements or acts would have little effect upon a man of average intelligence; and hence, whatever the actual effect produced in a particular case, the law takes no notice of them. Nor will it suffice to patch together loose and incoherent expressions, or to supply by guess-work enough to make out a representation. Nothing more than what the words or acts naturally and plainly import can be added.

The representation need not however be created by language; there is no distinction between an impression created by words and one created by acts. Language is **Words not necessary for a representation.** only one of the means of conveying thought. A thought may often be conveyed as distinctly by an act; enough, so far, that a clear impression is created upon the mind. If the impression is capable of being stated as a fact, and is such as might govern the conduct of an average man in regard to some change of position in contemplation, it satisfies the rule.

It follows that, to constitute a representation, it is not necessary, even when language alone is used, that the statements should be made in terms expressly affirming the existence of some fact. If the statement be such as would naturally lead the plaintiff, as a man of average intelligence, to suppose the existence of a particular state of facts, that is as much as if statements had so been made in exact terms¹.

It should be noticed that there is a difference in fact between vagueness and ambiguity. Vagueness, as we have **Vagueness and ambiguity distinguished.** seen, is fatal to the idea of a legal representation; but ambiguity in an impression may only mean that more than one fact has been impressed upon the mind, not that none at all has been left there.

In such a case as this the only question that can arise in reason or in law is whether, assuming the facts to be clear and definite, the plaintiff reasonably acted upon the one which

¹ Lee v. Jones, 17 C. B. N. S. 482; s. c. 14 C. B. N. S. 386.

was false. That he did this it devolves upon him to show. For example: The defendants issue a prospectus in regard to a company, in process of formation to take over certain iron works, which prospectus contains the following statement: 'The present value of the turnover or output of the entire works is a million pounds sterling per annum.' This statement might mean either that the works had actually turned out more than a million's worth at present prices within a year or yearly, or only that the works were capable of turning out so much; in the former case it is false, in the latter it might be true. The plaintiff, who has been induced to buy shares in the undertaking, must show that he acted upon the statement in the sense in which it was false¹.

Where a term of art, having a technical and also a popular meaning, has been used, the case may be affected by presumption. Between parties engaged in the vocation in which the term has a technical meaning, the presumption (probably) would be, that the representation was to be taken in the technical sense; if the parties were engaged in different vocations, there would perhaps be no presumption either way. In either case it would be necessary, judging from the decision just stated, for the plaintiff to show that he had acted upon the representation in the sense in which it was false; and even then there could not be a cause of action if the defendant made the statement with reasonable ground to suppose that it would be acted upon in the sense in which it was true. The presumption however, in any case, would only be a *prima facie* one.

Another case may be mentioned. A statement of fact may have one meaning in one place and another in another; in such a case it would seem that the statement should be understood as intended in the sense in which it is commonly used where it was made, unless, indeed, it was made there by one residing where it is used in a different sense. In this latter case the courts would (probably) consider the party bound only by that meaning which he would have reason to suppose was conveyed.

The impression created must be of a 'fact,' a word which

¹ *Smith v. Chadwick*, 9 App. Cas. 187; s. c. 20 Ch. Div. 27.

imports something capable of being known. Does this mean,

Impression
of fact
necessary:
opinion as
fact.

in the case of a statement, that what is stated must be stated as a fact? There is some confusion in the books in regard to this question.

It is commonly said that the law takes no notice of statements of opinion, or of statements in regard to future events or conduct short of contract. But that is by no means universally true; and even when true its truth does not rest upon the ground that such statements are not statements of fact. As a matter of form it is true that statements of opinion and statements relating to the future ordinarily are not statements of fact; but in reality they always involve and imply statements of fact. The fact involved is indeed a *mental* fact, to wit, the state of mind—the opinion, belief, or intention—of the person speaking. But a mental fact is as truly a fact as a non-mental fact; the person making it may know whether it is true or false. He will know whether his belief or intention is as he has stated. Anything capable of being known is a fact, as the law looks upon the subject; and a mental fact is as capable of being known as a non-mental fact.

The result is that when a man states that his opinion, belief, or intention is so-and-so, he has virtually and in real effect stated that he knows of nothing to make his statement of opinion, belief, or intention a sham. If then the law requires that what is stated should be stated as a fact, the case in question fulfils the requirement; the statement is in effect—and that is the real test—a statement of fact. For example: The defendant, seller of a hotel under lease, says to the plaintiff, the buyer, that the tenant is a 'most desirable tenant.' Assuming that what is 'desirable' in such a case is matter of opinion, still the statement is in effect a statement of fact, for the seller 'impliedly states that he knows facts which justify his opinion¹.' Again: The defendant, a cattle dealer, selling cattle to the plaintiff, states that he is of opinion that the cattle will weigh 900 lb. and upwards per head. This in effect is a statement of fact, to wit, that the defendant knows nothing to make the opinion a sham².

¹ *Smith v. Land & House Corp.*, 28 Ch. Div. 7.

² *Birdsey v. Butterfield*, 34 Wisconsin, 52.

These are cases of statements (in the form) of opinion; but it is obvious that statements in regard to the future stand upon the same footing. Thus, if a person were to say that a certain ship 'will arrive to-morrow,' that would amount to a statement that he knew nothing to the contrary, and hence would be a statement of fact. So a promise to pay for property bought imports a statement of intention to pay¹; and intention is a matter of fact².

It is clear then that the contrast often drawn or suggested is a misleading one. The true contrast is between things, whether put as fact or as opinion, belief, or intention, which are persuasive of action, and things which are not, as the words (of the definition) next to be considered show.

False contrast
of fact and
opinion: the
true contrast.

The statement or act must be one 'sufficient to influence the conduct of a man of ordinary intelligence.' The meaning of this rule however, like that of the one just considered, is in some particulars a matter of doubt. Thus, in the sale of goods 'simplex commendatio non obligat.' But what is 'simplex commendatio'? A simple statement of value by a vendor is a clear case on the one hand; a plain statement of fact going to make up value, as the age of a horse, is an equally clear case on the other. But what of statements falling between the two extremes? The question cannot be definitely answered; most of the cases that arise have to be determined upon the special facts attending them. That is to say, particular rules can seldom be framed to reach them, and general rules have only a remote bearing upon them.

One or two limited rules however have been laid down touching the subject. In America it has been declared by some courts³, and denied by others⁴, that a vendor's false

¹ Bristol v. Wilsmore, 1 B. & C. 514.

² 'I have no doubt that if a man says he expects so-and-so, when he does not, his statement is an untrue statement of fact.' Karberg's Case, 1892, 3 Ch. 1, 11, Lindley, L. J.

³ Van Epps v. Harrison, 5 Hill (New York), 63; Page v. Parker, 43 New Hampshire, 363.

⁴ Cooper v. Lovering, 106 Mass. 79; Bishop v. Small, 63 Maine, 12.

What was
said or done
must have
been sufficient
to influence
conduct:
examples.

statements of what an article or a tract of land cost, or what at some time it has brought, or what has been offered for it, may come within the cognizance of the law like ordinary representations of fact. But it is generally agreed by the American courts that such statements when made, not by the vendor, but by a stranger, may constitute actionable misrepresentations. For example: The defendant, not being the seller of the property, falsely states that a tannery has on a previous sale brought a certain price. This is a misrepresentation capable of sustaining an action¹.

However that may be, it is settled law that statements of the income of property, or of the rental receipts of a leasehold estate to be sold, constitute representations of fact which may safely be acted upon. For example: The defendant, seller of a public-house, falsely tells the buyer, the plaintiff, that the receipts of the house have been £160 per month, and that the tap is let for £82 per annum, and two rooms for £27 per annum. This is a false representation sufficient to influence conduct, and not a mere statement of value². So possibly if the statement were that the present 'value' of the property is a certain sum per year; for that might mean its annual return³.

Statements concerning the pecuniary condition of an individual, as for instance of the amount of property he owns, also stand upon a different footing from statements of value; they may govern conduct⁴. For example: The defendant says to the plaintiff, 'P is pecuniarily responsible. You can safely trust him for goods to the amount of £3,000.' This is a representation of fact which may govern conduct⁵.

Again, to come within the notice of the law, the representation, if not made by a lawyer to a layman, or by a man

¹ *Medbury v. Watson*, 6 Metcalf (Mass.), 246.

² *Dobell v. Stevens*, 3 B. & C. 623; *Medbury v. Watson*, *supra*, at p. 260; *Ellis v. Andrews*, 56 N. Y. 83, 86. See *Fuller v. Wilson*, 3 Q. B. 58; *Lysney v. Selby*, 2 Ld. Raym. 1118.

³ See *Smith v. Chadwick*, 9 App. Cas. 187, ante, p. 57. But see *Ellis v. Andrews*, *ut supra*.

⁴ *Pasley v. Freeman*, 3 T. R. 51. Statute now requires that such representations must be made in writing, signed by the party to be charged. 9 Geo. 4, ch. 14.

⁵ *Pasley v. Freeman*, *supra*.

professing familiarity with the law to one not familiar with it, must, it seems, be more than a mere representation of what the law is. The reason of this has sometimes been said to be that all men are presumed to know the law; '*ignorantia legis neminem excusat*.' But it may be doubted whether that is the true ground of the rule; if it were, misrepresentation of the law by one's legal counsel could hardly be made the foundation of any liability. A better reason appears to be that the law is understood by all men to be a special branch of learning; and hence what one layman may say to another will seldom have the effect to alter conduct. But whatever the ground, the rule appears to be treated as settled¹. For example: The defendant misrepresents the legal effect of a contract which he thereby induces the plaintiff to enter into with him, both parties being laymen. The defendant is not liable in damages for the loss inflicted upon the plaintiff².

As the language above used however plainly implies, it is not broadly true that a misrepresentation of the law may not be ground for an action of deceit. If a person having superior means of knowing the law, and professing to know it, though not a lawyer and not professing to be, should knowingly give false information of it to an ignorant man in order to influence his conduct, there would (so far), it seems, be an actionable misrepresentation.

The proposition in the last paragraph may be generalized. In ordinary cases the representation must be such as to influence the conduct of a man of average intelligence; but the courts have not turned over the simple to be the prey of rogues. If a person is mentally deficient, or is but a child, the courts will protect him from designing men where they would leave others to their own folly³.

It is practically the same thing with saying that the state-

¹ See *Lewis v. Jones*, 4 B. & C. 506; *Beattie v. Ebury*, L. R. 7 Ch. 777, 804; *Eaglesfield v. Londonderry*, 4 Ch. Div. 693, Jessel, M. R., explaining the nature of a representation of law. And see *West London Bank v. Kitson*, 13 Q. B. Div. 360, 363, Bowen, L. J.

² *Upton v. Tribilcock*, 91 U. S. 45.

³ See post, p. 71.

ment or act should be sufficient to influence conduct, to say that it should be material; which latter is the usual way of stating the rule. But whichever way the rule is stated, it is not to be understood that the law will not take notice of the case if influences from other sources may have operated upon the plaintiff. The only question upon this point is whether the representation made by the defendant was adequate to influence, and did influence, the plaintiff, not whether it was the sole inducement to the action taken; if it was sufficient to influence him, and did influence him to some real extent, that is enough. The courts will not be astute to find that one of several inducements present was not adequate to the damage¹.

So far of the definition of the term 'representation.'

Further, it is for the plaintiff to show that the representation was false. But a representation is false in contemplation of law as well as of morals if it is false in a plain, practical sense; if, that is to say, it would be apt to create a false impression upon the mind of the average man. For example: The prospectus of a company about to construct a railway describes the contract for the work as entered into at 'a price considered within the available capital of the company.' The fact is that there is a merely nominal capital of £500,000, and from this the sum of £50,000 is to be deducted for the purchase of the concession for making the railway, and the contract price for making it is £420,000. The representation is false; the term 'available capital' not being a true description of capital to be raised by borrowing².

An example in contrast with the foregoing may be stated. A prospectus of a company formed for buying a certain business declares that the price of purchase is a stated sum, and that no 'promotion money' is to be paid to the directors of the company for making the purchase. In fact the sum paid for the business is somewhat less than the sum stated in the

¹ Reynell v. Sprye, 1 De G. M. & G. 660; Safford v. Grout, 120 Mass. 20; James v. Hodsdon, 46 Vermont, 127. Compare the Roman law of participants in wrongdoing. Lex Aquilia, fr. 11, §§ 1-4; Grueber, pp. 33-37.

² Central Ry. Co. v. Kisch, L. R. 2 H. L. 99. Another good example, Smith v. Land & House Corp., 28 Ch. Div. 7.

prospectus, and shares of the stock representing the difference are now transferred, part to the directors of the company who effected the purchase, which part is afterwards transferred to the company on complaint, and part to the solicitors in the transaction. This is not misrepresentation¹.

The defendant cannot then escape liability by showing that the representation was, if literally taken, true, or true if taken in some forced or unnatural sense. So too the defendant cannot rely upon the truth of the actual language used, when that is but part of the whole state of facts, and what was suppressed would, had it been stated, have given to the language used a contrary effect. If the part suppressed would have made the part stated false, there is a false representation²; for it is to be remembered that a representation includes all that it reasonably imports. For example: The defendant, desirous of buying stock of the plaintiff, a lady, of the value of which he knows that she is ignorant, tells her of a fact calculated to depreciate the value of the stock, but omits to disclose to her other facts within his knowledge which would have given correct information upon the subject. This is a breach of duty to the plaintiff³. Again: The plaintiff being about to supply the defendant's son with goods on credit, asks the defendant if his son has property to the value of £300, as the son has asserted. The defendant answers in the affirmative, stating that he has advanced the sum to his son, but failing to state that his son has given his promissory note for the amount. This is a false representation, though true in a literal sense⁴.

¹ *Arkwright v. Newbold*, 17 Ch. Div. 301. 'Nobody was ever lucky enough to sell a property without having some considerable deduction made out of the gross price, there being such persons as auctioneers and solicitors to be paid.' James, L. J.

² *Peck v. Gurney*, L. R. 6 H. L. 377, 403, Lord Cairns; *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99, 113.

³ *Mallory v. Leach*, 35 Vermont, 156.

⁴ *Corbett v. Brown*, 8 Bing. 33.

§ 3. DEFENDANT'S KNOWLEDGE OF FALSITY

In order to entitle a plaintiff to recover damages for misrepresentation, it is necessary, according to the common law of England, for him to prove that the defendant made the false representation fraudulently. A contract may, indeed, in many cases be rescinded, or its enforcement successfully resisted, for an innocent misrepresentation, that is to say for a false representation justly believed to be true at the outset by the party who made it¹; but if damages are sought, fraud in some sense must be proved, whether at law or in equity². Negligence (apart from statute) is not enough, unless there was a distinct duty to know³, of which presently.

Fraud as a technical term, within the meaning of this rule, or fraud in the narrower sense⁴, may be proved in any one of three ways, according to the nature of the case. It may be proved by showing (1) that the defendant made the representation with knowledge of its falsity; or (2) that he made it recklessly, without knowing whether it was true or false; or (3) that he made it under circumstances in which he was so specially related to the facts that it was his duty to know whether the representation was true or not⁵.

**Innocent
misrepresentation.**

**Fraud and
its legal
equivalents
in deceit.**

¹ *Arkwright v. Newbold*, 17 Ch. Div. 301; *Redgrave v. Hurd*, 20 Ch. Div. 1.

² *Derry v. Peek*, 14 App. Cas. 237, reversing 37 Ch. Div. 541; *Joliffe v. Baker*, 11 Q. B. D. 255; *Arkwright v. Newbold*, 17 Ch. Div. 301, 320; *Redgrave v. Hurd*, 20 Ch. Div. 1; *Reese Mining Co. v. Smith*, L. R. 4 H. L. 64; *Childers v. Wooler*, 2 El. & E. 287; *Evans v. Edmonds*, 13 C. B. 777, 786.

Proving the defendant's knowledge of the falsity of his representation is often called proving the 'scienter,' a term of the old common-law pleading.

³ *Low v. Bouverie*, 1891, 3 Ch. 82; *Le Lievre v. Gould*, 1893, 1 Q. B. 491; *Derry v. Peek*, 14 App. Cas. 327. But compare *Lehigh Zinc and Iron Co. v. Bamford*, 150 U. S. 665, 673; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403. See Pollock, *Torts*, 280-283, 6th ed. See also a valuable article by Professor Smith, on Liability for Negligent Language, in the *Harvard Law Review* for November, 1900, and the *Directors' Liability Act*, 53 & 54 Vict. c. 64, changing the law in cases like *Derry v. Peek*, *supra*.

⁴ The mental aspect of the larger idea of fraud as a means, i.e. as misrepresentation. See *ante*, p. 15.

⁵ There is at first sight an antinomy between law and equity on this point—the scienter of the old law precedents; knowledge of falsity (or the legal

The third of these aspects of the case calls for a few remarks. There the defendant stands in a peculiar situation in regard to the facts; the facts are specially within his reach; they are not facts that others may, even by inquiry, know as well. The result is, that any representation made by him touching them is likely to carry great weight, greater, other things being equal, than representations made in other cases. This fact *may* indeed be held enough to govern his conduct, and to require him to know the truth of the representation; in a word, he may be held practically to have warranted the representation to be true, and, warranting it, he cannot require the party with whom he has dealt to prove that he knew it to be false when he made it¹. Accordingly it is held that if a person assume to act for another in a matter over which he has no authority, he renders himself liable for misrepresentation, on the implied

equivalent) not being necessary in equity, in cases of false representation. But the conflict is not so great as it seems. In equity the injured party usually is suing for rescission of contract, or defending a suit for specific performance, the suit or the defence being based on misrepresentation (admitted for the sake of the question). The opposite party *now* at any rate knows that he has made a false representation; accordingly he ought not to consider the contract as binding, even in a suit for rescission, much less where he himself is suing for specific performance. Still it should be admitted that the usual way of putting the case in equity, is to say that a man ought to know the facts before making a statement of them. *Redgrave v. Hurd*, 20 Ch. D. 1, *Jessel, M. R.* But the way first stated is true, and removes the antinomy.

The question may however be put, why knowledge of falsity, or the legal equivalent, should in any case be required. Danger is observable where a man in *negligence* makes a false representation. That point has been much discussed. *Derry v. Peek*, 14 App. Cas. 327 (reversing 37 Ch. D. 541, holding negligence to be enough); *Scholfield Pulley Co. v. Scholfield*, 71 Connecticut, 1, 19 (groundless belief by defendant not enough). But it should be observed that the false representation is usually made, as in *Pasley v. Freeman*, 3 T. R. 1, upon an inquiry by the opposite party, to be answered at once; when it might well be too much to require diligence—e.g. that a man should recall and weigh correctly all the facts ever known by him—in a matter in which a man had no interest. A duty of diligence might exist where one had an interest (see 53 & 54 Vict. c. 64, Directors' Liability Act, which is on right lines) or where one volunteered the representation.

¹ See *Halbot v. Lens*, 1901, 1 Ch. 344, *Kekewich, J.*; *Collen v. Wright*, 8 El. & B. 647, Ex. Ch. As to railway time tables see *Denton v. Great Eastern Ry. Co.*, 5 El. & B. 860, giving a right of action to an intending passenger who suffers damage from an erroneous announcement of the departure of trains.

warranty at least—perhaps not strictly in tort¹—to the person whom he may thus have misled, though he may have honestly believed that he had the authority assumed². The matter of his authority was a fact peculiarly within his own means of knowledge, and it was therefore his duty to acquaint himself with the situation. The same may be said of a man's representations of his own power³.

Cases falling under this phase of the subject appear however, apart from representations of authority, power, or the like, to stand upon narrow ground, and the principle of liability is not to be extended to cases not clearly within it. Thus the fact that a person allows his name to be used as director or trustee of a corporation or other company, in prospectuses containing false representations, does not, by the common law, impose upon him in law the duty to know the truth of the statements, and so subject him to liability. To prove such fact is not in any sense to prove fraud, or create liability⁴.

What by the common law creates the duty to know the facts is a difficult question to answer. The following rule, laid down by an Irish judge, in a case of misrepresentation of power, is all perhaps that the nature of the case permits: What a man must know, it was in substance declared, must have regard to his particular means of knowledge, and to the nature of the representation; and this must be subject to the test of the knowledge which a man, paying that attention which every one owes to his neighbour in making a representation to be acted upon, ought to have known in the particular case by the use of such means⁵.

¹ *Halbot v. Lens*, 1901, 1 Ch. 344, Kekewich, J. But see *Jefts v. York*, 10 Cushing (Mass.), 392, 396, Shaw, C. J.

² *Collen v. Wright*, 8 El. & B. 647, 658; *Coventry's Case*, 1891, 1 Ch. 202, 211. See also *Randell v. Trimen*, 18 C. B. 786; *Firbank v. Humphreys*, 18 Q. B. D. 54, more fully reported 56 L. J. Q. B. 57; *Oliver v. Bank of England*, 1902, 1 Ch. 610; *Seton v. Lafone*, 19 Q. B. D. 68. The doctrine began in *Collen v. Wright* with supposed contract (brought about by the professing agent); but *Firbank v. Humphreys* and *Oliver v. Bank of England* have extended it to all transactions founded on representations of authority. See *Law Quarterly Review*, October, 1902, p. 364, for a criticism of the extension.

³ *Doyle v. Hort*, 4 L. R. Ir. 661.

⁴ *Western Bank v. Addie*, L. R. 1 H. L. Sc. 145; *Derry v. Peek*, 14 App. Cas. 327. But see the later statute, 53 & 54 Vict. c. 64, *Directors' Liability Act*.

⁵ *Doyle v. Hort*, 4 L. R. Ir. 661, 670, Palles, C. B.

§ 4. PLAINTIFF'S IGNORANCE OF FALSITY

The next element of the breach of duty is that requiring the plaintiff to show that he was ignorant of the truth of the matter concerning which the representation was made, and believed that it was true.

Both of these situations must, in general, be true of the plaintiff; he must have been ignorant of the true state of things, and have trusted the representation of them as made by the defendant. He must have been deceived; and to render the defendant liable, the plaintiff must have been deceived by the defendant. If the plaintiff had knowledge of the facts in question, or if without having knowledge of them he acted upon independent information, and not upon a belief of the truth of the defendant's representation, he is in the one case not deceived at all, and in the other is not deceived by the person of whom he complains.

It was however at one time laid down, in effect, that if the means of knowledge be equally open to both parties, the plaintiff, as a prudent man, should be deemed to have availed himself of such means (or should not be excused if he has not done so), and hence that, in contemplation of law, he has not been deceived by the defendant's misrepresentation; the result being that, unless there was a warranty, no action could be maintained¹. There is indeed no liability in any case standing upon ordinary footing, in which the defendant has not been guilty of fraud of any kind, and has made no warranty, even if the plaintiff had no means of knowledge. But the broad doctrine before stated has been abandoned.

It may be hard to believe that a plaintiff did not avail himself of means of knowledge, at any rate when directly at hand; but there is in principle, and by authority, nothing

¹ *Vernon v. Keys*, 12 East, 632. Lord Ellenborough here said that a seller is liable to an action for deceit if he fraudulently misrepresent the quality of the property in some particular 'which the buyer has not equal means with himself of knowing.'

more than a question of fact in the case. There is no conclusion of law either that the plaintiff availed himself of the means, or that it was his duty to do so; the plaintiff may still show that he was misled by the defendant's representation¹. For example: A prospectus of a company in process of formation falsely states that the capital stock is a certain sum, and the plaintiff is induced by this statement to subscribe for shares of stock in the company. The plaintiff might have learned the true state of things by examining the records of the company, which were open to his inspection, but did not make the examination. He is not thereby barred of redress².

The subject may be further illustrated by a quite different sort of case. Every man is presumed to know the contents of a written contract signed by him; but no presumption of knowledge will stand in the way of a charge of misrepresentation or other fraud in regard to the contents of the writing³. No doubt it would be imprudent not to read or to require the reading of an instrument before signing or accepting it; indeed, the courts would be apt to turn a deaf ear to a man who sought to get rid of a contract solely on the ground that its terms were not what he supposed them to be. But the case would be different where a plaintiff charged fraud upon the defendant in reading the contract to him, or in stating its terms, or in secretly inserting terms not agreed upon⁴.

The usual course of proceeding in regard to cases of the kind now under consideration is to rescind the contract; but such a course may have become impossible⁵. And whether it be possible or not, it is a well-established rule of law that one who has been induced by fraud to enter into a contract, whether executory or wholly (as by sale and payment) executed, may treat the contract as binding, retain its fruits, and sue for the

¹ *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99, 120; *Smith v. Land and House Corp.*, 28 Ch. Div. 7; *Redgrave v. Hurd*, 20 Ch. Div. 1, 13; *Reynell v. Sprye*, 1 De G. M. & G. 668, 709; *Stanley v. McGauran*, 11 L. R. Ir. 314; *Saukey v. Alexander*, Ir. R. 9 Ex. 259, 316.

² *Central Ry. Co. v. Kisch*, *supra*.

³ *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Stanley v. McGauran*, 11 L. R. Ir. 314.

⁴ *Stanley v. McGauran*, *supra*.

⁵ See *Clarke v. Dickson*, El. B. & E. 148.

Contents
of written
instrument:
rescission.

fraud by which it was effected¹. Hence in the case of a written contract knowingly misread, misstated, or miswritten, the party wronged may (probably) maintain an action of deceit for the damage he may have incurred, while at the same time treating the contract as in itself valid.

But the defendant must have been guilty of fraud, as by knowingly misreading or misstating the instrument. Should he profess to state no more than the effect of a long writing, he could not, it seems, be liable in damages for a mistake; though equity might reform the instrument at the instance of the party injured.

The explanation of all this is not far to seek. It is not for a person who admits that he has been guilty of endeavouring to mislead another by misrepresentation, to say to him, when called to account, 'You ought not to have trusted me; you were negligent; you ought to have made inquiry.' The law requires indeed the exercise of prudence by both parties; but that is all. If prudence on the one side has been disarmed by misrepresentation on the other, the law cannot justly refuse relief. Besides, the case of a plaintiff so situated is quite different from that of a defendant so related to the facts as to be bound to know the truth. In this latter case no one has misled the defendant; in the case under consideration the misrepresentation has, upon the hypothesis, misled the plaintiff.

The case is not varied in law by the circumstance that the plaintiff may have made some examination on his own behalf; if still he was misled by the false representation of the defendant and prevented from making such examination as otherwise he would have made, he will be entitled, so far, to recover. For example: Representations concerning a hotel about to be sold at auction are made by the seller in printed particulars of sale. The buyer, having seen the statements, sends his agent to look over the premises to see whether it will be advisable to buy. The agent goes

¹ Regina v. Saddlers' Co., 10 H. L. Cas. 404, 421; Western Bank v. Addie, L. R. 1 H. L. Sc. 167.

accordingly, and having made examination, makes an unfavourable report; but the purchase is made. The buyer may show that he was induced by the representations of the seller to buy¹.

When the defendant induces the plaintiff to abstain from seeking information, mere concealment of material facts may

When concealment is a breach of duty.

become a breach of duty; and redress will not be refused in such a case merely because a sharp business man might not have been deceived.

Nor (according to American authority) is the rule of law different when the defendant suggests examination to the plaintiff, but in such a way as to indicate that the step would be quite unnecessary. For example: The defendant, in selling to the plaintiff property at a distance, suggests to the plaintiff that he go and look at the property, 'as their judgment might not agree, and, if not satisfied, he would pay the plaintiff's expenses, but if satisfied the plaintiff should pay them himself.' This is deemed to justify the plaintiff in acting upon the defendant's representations without examining the property².

Even though a party sell at the risk of the purchaser, 'with all faults,' as he may, he will have no right to practise

Sale with faults.

fraud; and if he should do so he will be liable as for a breach of his legal duty to the purchaser.

For example: The defendant sells to the plaintiff a vessel, 'hull, masts, yards, standing and running rigging, with all faults, as they now lie.' He however makes a false statement, that the 'hull is nearly as good as when launched,' and takes means to conceal defects which he knew to exist. This is a breach of duty to the plaintiff³. But the case would be different if the seller, though aware of the defects, should do nothing to conceal them⁴.

When the parties, by reason of physical or mental infirmity

¹ *Smith v. Land and House Corporation*, 28 Ch. Div. 7.

² *Webster v. Bailey*, 31 Michigan, 36.

³ *Schneider v. Heath*, 3 Campb. 506. See *Whitney v. Boardman*, 118 Mass. 242, 247.

⁴ *Baglehole v. Walters*, 3 Campb. 154 (overruling *Mellish v. Motteux*, Peake, 156); *Pickering v. Dowson*, 4 Taunt. 779; *Bywater v. Richardson*, 1 Ad. & E. 508.

on the one side, or of the fact that the one party is in the **inequality of parties.** occupation or management of the other's business, or has the general custody of his body, do not stand upon an equal footing, the objection to a suit for false representations, that the party to whom they were made was negligent in not making inquiry or examination, has still less force. Examples of this class of cases may be readily found in the case of transactions with aged persons, or with *cestuis que trust* by trustees, or with wards by guardians¹.

§ 5. INTENTION THAT THE REPRESENTATION SHOULD BE
ACTED UPON

In regard to that element of the breach of duty under consideration which requires the plaintiff to prove that the defendant intended his representation to be acted upon, it is to be observed that, while the rule is **Misrepresentation in regard to third persons.** well settled, its force appears chiefly in those cases in which the deception was practised with reference to a negotiation with a third person, and not with the defendant. In cases of that kind, an instance of which is found in false representations to the plaintiff of the solvency of a third person², it is plain that the transaction with such third person, though shown to have been caused by the defendant's false representation, affords no evidence of an intention in the defendant that the representation should be acted upon by the plaintiff. It would be perfectly consistent with mere evidence that the plaintiff acted upon the defendant's misrepresentation in a transaction with a third person, that the defendant, though he knew the falsity of his representation, did not know, and had no reason to suppose, that the plaintiff would act upon it. The representation might, for all this, have been a mere idle falsehood, such as would not justify any one in acting upon it.

It follows that where a party complains of false representations, whereby he was caused to suffer damage in a

¹ See also ante, p. 61.

² *Pasley v. Freeman*, 3 T. R. 51.

transaction with some third person, it devolves upon him to give express evidence either that the defendant intended that he should act upon the representation, or the legal equivalent, that the plaintiff was justified in inferring such intention¹; and that it is not enough to prove that the misrepresentation was made with knowledge of its falsity².

When however the effect of the false representation was to bring the plaintiff into a business transaction with the defendant, the case is quite different. Proof of such a fact shows at once the intent of the defendant to induce the plaintiff to act upon the representation; and it follows that no evidence need be offered of an intention to that effect, or of reasonable ground to suppose an intention. The principle appears most frequently in cases of sales; the rule of law being, that if the plaintiff, the purchaser, establish the fact that the defendant, the vendor, knew that his representation was false, it is not necessary for the plaintiff to give further evidence to show that the defendant intended to induce the plaintiff to buy. But the rule is not confined to sales—it is general³.

Indeed, it is not necessary in any case that it should appear that the defendant intended to *injure* the plaintiff. It has already been stated that a person honestly professing to have authority to act for another is liable as if for fraud for the damages sustained, if he has not the authority⁴. In such cases it is obvious that the representation may have been made for the benefit of the plaintiff⁵. So too in cases in which the defendant has made the misrepresentation with knowledge of its falsity, it is plain that he may really have desired and expected that the plaintiff would derive a benefit from the transaction. The law requires proof of intention (or the equivalent), not because it is supposed

¹ See *Freeman v. Cooke*, 2 Ex. 654; *Cornish v. Abington*, 4 H. & N. 549.
² See *Pasley v. Freeman*, 3 T. R. 51.
³ See *Foster v. Charles*, 6 Bing. 396; s. c. 7 Bing. 105; *Polhill v. Walter*, 3 B. & Ad. 114.
⁴ Ante, p. 65.
⁵ See *Polhill v. Walter*, 3 B. & Ad. 114.

to be necessary to prove a *bad motive* on the part of the defendant, but to show that he understood the position of the plaintiff as a person likely to be misled. It is in that way only that intention is an element in the breach of duty. Proof of malice will serve the purpose, but is not required¹. All that is required on this point is that the defendant should have intended, or should reasonably be supposed to have intended, that the plaintiff should act upon the representation.

§ 6. ACTING UPON THE REPRESENTATION

It is fundamental that the defendant's representation should have been acted upon by the plaintiff, and acted upon to his injury, to enable him to maintain an action for the alleged breach of duty². Indeed, fraudulent conduct or dishonesty of purpose, however explicit, will not afford a cause of action unless shown to be the very ground upon which the plaintiff acted to his damage.

Representation must be acted upon to plaintiff's damage.

So strong is the rule upon this subject that it is deemed necessary to this action that the damage as well as the acting upon the representation must already have been suffered before the bringing of the suit, and that it is not sufficient that it may occur. For example: The defendant induces the plaintiff to indorse a promissory note before its maturity by means of false and fraudulent representations. An action therefor cannot be maintained before the plaintiff has been compelled to pay the note³.

Indeed, a person who has been prevented from effecting an attachment upon property by the fraudulent representations of the owner or of his agent is deemed in America to have suffered no legal damage thereby, though subsequently another creditor attach the whole property of the debtor and sell it upon execution to satisfy his own debt⁴.

Preventing attachments.

¹ Foster v. Charles, 6 Bing. 396; s. c. 7 Bing. 105.

² Pasley v. Freeman, 3 T. R. 51; Smith v. Chadwick, 9 App. Cas. 187; Freeman v. Venner, 120 Mass. 424.

³ Freeman v. Venner, 120 Mass. 424.

⁴ Bradley v. Fuller, 118 Mass. 239. But see Kelsey v. Murphy, 26 Penn. St. 78.

The person thus deceived, having acquired no lien upon or right in the property, cannot lose any by reason of the deceit. The most that can be said of such a case, it has been observed, is that the party intended to attach the property, and that this intention has been frustrated¹; and it could not be certainly known that that intention would have been carried out². If the attachment had been already levied and was then lost through the deceit, the rule would of course be different³.

It must appear moreover that the *plaintiff* was entitled to act upon the representation; a fact to be shown by the intention, or the reasonably presumed intention, of the defendant. The representation may have been intended for (1) one particular individual only (in which case he alone is entitled to act upon it), or (2) it may have been intended for any one of a class, or (3) for any one of the public, or (4) it may have been made to one person to be communicated by him to another. Any one so intended, who has acted upon the misrepresentation to his damage, will be entitled to redress for any damage sustained by acting upon the representation⁴. For example: The defendants put forth a prospectus to the public, containing false representations, for the purpose of selling shares of stock in their company. The plaintiff, as one of the public, may show that he acted upon the representations, and, having bought stock accordingly, recover damages for the loss sustained thereby⁵.

Who may act
on the repre-
sentation.

¹ *Bradley v. Fuller*, 118 Mass. 239.

² *Bradley v. Fuller*, *supra*.

³ *Id.*

⁴ *Richardson v. Silvester*, L. R. 9 Q. B. 34; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Peek v. Gurney*, Law R. 6 H. L. 377.

⁵ *Andrews v. Mockford*, 1896, 1 Q. B. 372, distinguishing *Peek v. Gurney*, L. R. 6 H. L. 377.

§ 7. KINDRED WRONGS: QUASI-DECEIT: UNFAIR COMPETITION

We come now to certain kindred wrongs, which may be called cases of quasi-deceit. These vary somewhat in legal aspect from deceit proper as presented in the foregoing pages, and yet they have enough in common with that subject to be treated as kindred to it. The subjects referred to are (1) the simulation of another's 'trade name' or business sign, and (2) disparaging statements of another's property, otherwise called Slander of Title. But Slander of Title introduces malice, and is a distinct tort; it will accordingly have a separate chapter.

**Fraudulent
use of trade
name or busi-
ness sign.**

A trademark proper is a mark or device, registered under statute, to identify a man's goods offered for sale or not. The owner of a valid statutory trademark has *property* in the same, with right of protection accordingly; his right accordingly does not turn upon the practice of fraud, or anything in the nature of fraud, and hence is not a subject for consideration here¹. By 'trade name' is meant a name, mark, or device not registered according to statute and not a subject of property in the plaintiff. No action therefore can be based upon any infringement of a property right; there must be simulation, together with deception, practised by the defendant on the public against the plaintiff². The wrong is often called 'unfair competition.' The trade name or mark may be one already in use and known to the trade as the name or mark of a particular person, or it may be new.

In order to sustain an action for *damages* for alleged wrongful use of a trade name, the plaintiff must show (1) that the trade name used by the defendant so resembled that of the plaintiff as to be likely to deceive the ordinary buyer, (2) that the defendant knew of the existence of the plaintiff's mark when he committed the alleged wrong, (3) that he intended to palm off

**What must
be proved in
the case of a
trade name.**

¹ See post, chap. xii, § 2.

² See *Reddaway v. Banham*, 1896, A. C. 199; *Ratcliffe v. Evans*, 1892, 2 Q. B. 524, 528, as to damage.

the goods as the goods of the plaintiff, and (4) that the public were deceived thereby to the plaintiff's hurt¹. For example: The defendant sells a medicine labelled 'Dr Johnson's ointment'; the label being one which the plaintiff had previously used, and was still using when the defendant began to make use of the same. The plaintiff cannot recover without showing that the defendant has used the label for the purpose of indicating that the medicine has been prepared by the plaintiff². Again: The plaintiff Sykes is a maker of powder-flasks and shot-belts, upon which he has placed the words 'Sykes Patent.' There is no valid patent upon them, in fact, as has been decided by the courts; but the maker has continued to use the words upon the goods to designate them as of his own making. The defendant, whose name is also Sykes, makes similar goods, and puts upon them the same words, with a stamp closely resembling that of the plaintiff, and then sells the goods 'as and for' the plaintiff's goods. This is a breach of duty³.

If the case be one of alleged wrongful conduct in the use of a business sign or badge likely to deceive, the proof required will be the same, except that, instead of the 'palming off' under head (3), the plaintiff, to recover damages, must show that the defendant intended to represent that the business which he was carrying on was the plaintiff's business, or business in which the plaintiff had some special interest. For example: The defendant has the words 'Revere House' painted upon coaches which he uses to carry passengers from the railroad station to a hotel of the name. By contract with the proprietor of the hotel the plaintiff has the exclusive right to represent that he has the

Wrongful
use of busi-
ness sign.

¹ *Sykes v. Sykes*, 3 B. & C. 541; *Rodgers v. Nowill*, 5 C. B. 109; *Morison v. Salmon*, 2 Man. & G. 385; *Crawshay v. Thompson*, 4 Man. & G. 357, 379, 383. In a proceeding for *injunction* it is not necessary, even in these cases of quasi-trademark, to prove the defendant's knowledge or intent to deceive. Simple priority of use of the mark is enough. See *Millington v. Fox*, 3 Mylne & C. 338; *Singer Machine Co. v. Wilson*, 3 App. Cas. 376; *Reddaway v. Bentham Hemp-Spinning Co.*, 1892, 2 Q. B. 639, 644, 646. The subject of trademarks is being assimilated to the law of property, as trademarks proper are taking the place of mere trade names; and actions for deceit are becoming infrequent, though still available.

² *Singleton v. Bolton*, 3 Doug. 293. This supposes, of course, that the medicine was not patented.

³ *Sykes v. Sykes*, *supra*.

patronage of the hotel. The defendant commits no breach of duty to the plaintiff, unless he so makes use of the designation as to indicate that the proprietor of the hotel has granted to him what has been granted to the plaintiff alone¹.

¹ *Marsh v. Billings*, 7 Cushing (Mass.), 322. When an *injunction* merely is asked for by one who has lawfully had use of an unregistered name or mark, known to the trade, it is not necessary, any more than it is of the case of a legal, registered trademark, for such one to prove an intent on the part of the defendant to palm off his goods as the goods of the plaintiff; enough that the name or mark adopted by the defendant, from resembling that of the plaintiff, will be likely to deceive the ordinary buyer. Or to put it in language quoted and approved by the Circuit Court of Appeals of the United States: 'When such a mark, name, or phrase has been so used by a person in connection with his business or articles of merchandise as to become identified therewith and indicate to the public that such articles emanate from him, the law will prohibit others from so using it as to lead purchasers to believe that the articles they sell are his, or as to obtain the benefit of the market he has built up thereunder.' *Fuller v. Huff*, 104 Fed. Reporter, 141, 143.

The same name or mark, so in use, may indeed be used by others, if it be not a true trademark of the statute; but in that case there must be a plain designation that the name or mark is that of the person using it, and not that of the plaintiff. *Powell v. Birmingham Vinegar Co.*, 1894, 3 Ch. 449, 461; affirmed, 1897, A. C. 710.

CHAPTER II

2. *Lawful Acts done of Malice*

SLANDER OF TITLE

Statement of the duty. A owes to B the duty not to disparage B's property, to B's damage, by false and malicious representations.

Slander of title was the name originally of an action for false and disparaging representations in regard to the plaintiff's title to land; but in recent times the action and name have been extended to false and disparaging statements in regard to property of every kind, and that too whether the statements relate to title or to quality¹.

The only real connection the action has with actions for slander (or libel) is in the name the action bears and in the structure of the ancient declaration, which in following the declaration in slander has followed a misleading analogy.

§ 1. WHAT MUST BE PROVED

The plaintiff in actions at law for slander of title has to prove that the statements are false, that they were made with malice, and that they have been followed by damage². Of two of the elements of this action,
Falsity.

¹ *Malachy v. Soper*, 3 Bing. N. C. 371 (title to personalty); *Gott v. Pulsifer*, 122 Mass. 235 (quality of personalty, 'Cardiff Giant').

² *Malachy v. Soper*, 3 Bing. N. C. 371; *Pater v. Baker*, 3 C. B. 831, 868. See *Mellin v. White*, 1894, 3 Ch. 276, C. A.

the falsity of the representations and damage, it will be enough to refer to what has been said of the same things in the chapter on Deceit; there is no difference between the two wrongs in those particulars. In regard to malice too, what has been said in another place¹ may be referred to; but a few words should be added here.

§ 2. MALICE

The malice which must be proved in slander of title is 'actual' malice, in the sense indeed of a state of the mind, but not necessarily in the sense of motive. It is no **Actual malice required.** doubt true that to prove an evil motive for the false representations will (with damage) make a *prima facie* case of 'actual' malice in the sense of the rule, and that that would presumptively overturn the *permission* or privilege to make the false representations,—for it must be remembered that there can be no legal right to make such representations². But still there is reason to believe that the effect of the evidence would be overturned by proof that the defendant believed what he said to be true and said it in good faith, however much he may also have wished to harm the plaintiff. *A* may make a false claim to property held by *B*, believing his claim to be true, and in good faith assert his intention to make good the claim, hoping at the same time to ruin *B* in the contest, in hatred of him³. At any rate it is laid down that belief and good faith on the part of the defendant will

¹ Ante, pp. 18–22.

² That the case is one of permission or privilege only, see *Halsey v. Brotherhood*, 19 Ch. D. 386; *Wren v. Weild*, L. R. 4 Q. B. 730; *Gott v. Pulsifer*, 122 Mass. 235.

³ See *Wren v. Weild*, L. R. 4 Q. B. 730, 734, Blackburn, J., for the court: 'Where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and indeed in common fairness bound, to give the intended purchaser warning of such his intention. . . . And consequently we think no action can lie for giving such preliminary warning, unless either it can be shown that the threat was made *mala fide*, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful.' The qualifying words 'unless . . . purchaser' plainly imply that if there was a real purpose to follow up the claim by an action, it would not matter that the claim was also made to injure the plaintiff.

be a defence to the *prima facie* case. For example: The defendant, to the damage of the plaintiff, falsely states to a third person, with whom the plaintiff has made a contract for the sale of certain lands, that the plaintiff's title to the property will 'sooner or later be contested'; that when the lands were sold to the plaintiff the vendor 'was not in a state of soundness or competency.' The defendant made this statement in good faith, believing it to be true. This is no breach of duty to the plaintiff¹.

Further, though it is true that to prove an evil motive makes a *prima facie* case of the malice required, it is also true that the plaintiff is not bound to prove anything of the kind. It is well settled that it is enough for the plaintiff to prove that the defendant made the false representations with knowledge that they were false or in reckless disregard of the consequences of making them. For example: The plaintiff in his declaration alleges that the defendant made a claim falsely and maliciously and without probable cause, knowing that he had no claim, to goods of the plaintiff, to the plaintiff's damage. The declaration is good; knowledge of the baselessness of the claim would be sufficient evidence of malice². Again: The defendant is sued in slander of title for publishing in a newspaper, of which he is proprietor, false and disparaging statements concerning a statue owned by the plaintiff, called the Cardiff Giant. The judge instructs the jury that the plaintiff must prove that the statements were made with a disposition wilfully and purposely to injure the value of the statue, with wanton disregard of the interest of the owner. The instruction is erroneous; the plaintiff need only prove that the statements were made with a reckless disregard of the plaintiff's rights and of the consequences to him³.

¹ *Pitt v. Donovan*, 1 Maule & S. 639; *Wren v. Weild*, *supra*.

² *Green v. Button*, 2 Crompt. M. & R. 707; *Wren v. Weild*, L. R. 4 Q. B. 730, 734.

³ *Gott v. Pulsifer*, 122 Mass. 235, Gray, C. J.: 'Malice in uttering false statements may consist either in a direct intention to injure another or in a reckless disregard of his rights and of the consequences that may result to him.' *Hibbs v. Wilkinson*, 1 F. & F. 608, 610; *Paris v. Levy*, 2 F. & F. 71, 74; s. c. 9 C. B. N. s. 342, 350; *Strauss v. Francis*, 4 F. & F. 1107, 1114.

It will accordingly be noticed that what is required in the name of malice in the law of slander of title is satisfied by proof of what is called fraud, in the narrower sense, in the law of deceit, to wit, knowledge of falsity, or falsity with recklessness of consequences¹. Whether the other methods of proving fraud in deceit² would satisfy the law of slander of title in regard to malice does not appear. But it is clear that fraud and malice are not synonymous terms. Fraud taken in its broad sense signifies something more than a state of mind; as we have elsewhere seen, it imports means employed, while malice as an entity, in whatever sense, is only a state of the mind.

Though the term 'fraud,' then, as the word is commonly used in deceit, is here an interchangeable term with malice, and though in regard to falsity and damage deceit and slander of title are in accord, that is all that can be said. At that point we come to an end of slander of title, but not of deceit. Several other elements of liability would be required to make a case of deceit, which in the nature of things could not belong to the present wrong,—ignorance of the plaintiff and intention that the plaintiff should act upon the misrepresentations. Slander of title has therefore a place of its own, as a distinct wrong, in the law of torts.

¹ Ante, p. 64.

² Id.

CHAPTER III

2. *Lawful Acts done of Malice, concluded*

MALICIOUS PROSECUTION

Statement of the duty. A owes to B the duty not to institute against him a prosecution, with malice and without reasonable and probable cause, for an offence falsely charged to have been committed by B.

When a termination of prosecution is referred to without further explanation, such a termination is meant as will, in connection with the other elements of the action, permit an action for malicious prosecution.

The word 'prosecution' includes such civil actions as may be the subject of a suit for malicious prosecution.

The term 'probable cause' is used for brevity, in this chapter, for 'reasonable and probable cause¹.'

Civil redress for malicious prosecutions is of statutory origin. Before the thirteenth year of Edward the First there was no sufficient restraint against such perversions of justice; the provision of Magna Carta in regard to imprisonment and dispossession of lands was little more than a declaration of right. But in the year mentioned two statutes were passed which, though long since obsolete and forgotten as statutes, struck their roots deep and have had a permanent influence on

¹ There may be some slight difference in meaning in special cases, between 'reasonable' and 'probable' cause. See the language of Tindal, C. J., in *Broad v. Ham*, 5 Bing. N. C. 722, 725, quoted in *Lister v. Perryman*, L. R. 4 H. L. 521, 530, 540. Ordinarily however the words are synonymous.

the law. The two statutes were called respectively the Statute of Malicious Appeals¹, and the Statute of Malicious Distresses in Courts Baron². The first is the more important³.

§ 1. WHAT MUST BE PROVED

In order to maintain an action for a malicious prosecution, three things are necessary, and sometimes four, to wit, (1) the prosecution complained of must have terminated before the action for redress on account of it is begun; (2) it must have been instituted without probable cause; (3) it must have been instituted maliciously; (4) actual damage must be proved in cases in which the charge in itself would not be actionable, assuming that an action for malicious prosecution is maintainable in such a case. And it devolves upon the plaintiff to prove all these facts.

Actions for malicious prosecution are brought, for the greater part, only for wrongful criminal prosecutions. For civil suits instituted of malice and without probable cause English policy is against giving redress except in special cases⁴. Redress of the kind appears to be confined to cases of actions involving charges of 'scandal to reputation or the possible loss of liberty'⁵, such as 'proceedings in bankruptcy against a trader⁶, or the analogous process of a petition to wind up a company⁷.' 'If a man fancies he has

¹ 13 Edw. 1, c. 12.

² 13 Edw. 1, c. 36.

³ There were other statutes of the same and subsequent reigns in regard to malicious prosecutions, but they need not be specially mentioned here. See Bigelow's Leading Cases on Torts, 192, 211.

⁴ 'In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.' *Quartz Hill Mining Co. v. Eyre*, 11 Q. B. Div. 674, 690, Bowen, L. J. But (as the text intimates) there are some exceptions, as in cases involving false imputations touching business reputation. See *id.* p. 691.

⁵ 11 Q. B. Div. 691, Bowen, L. J.; Pollock, Torts, 311, 6th ed.

⁶ *Metropolitan Bank v. Pooley*, 10 App. Cas. 210.

⁷ Pollock, 311; 11 Q. B. Div. 691.

a right, he may sue an action¹, without fearing a suit in case of failure. But where there has been a wrongful arrest, there is ground for a suit for false imprisonment, though there may be none for malicious prosecution².

§ 2. THE TERMINATION OF THE PROSECUTION

The action for a malicious prosecution is given for the preferring in court of a *false* charge, maliciously and without proper grounds. And, as it cannot be known by satisfactory evidence whether the charge is true or false before the verdict and judgment of the court trying the cause, it is deemed necessary for the defendant to await the termination of the proceeding before instituting an action for malicious prosecution. Or, as the reason has more commonly been stated, if the suit for the alleged malicious prosecution should be permitted before the prosecution itself is terminated, inconsistent judgments might be rendered,—a judgment in favour of the plaintiff in the action for the prosecution, and a judgment against him in that prosecution³; and it has been said that judgment against the party prosecuted would show, and that conclusively, that there was probable cause for the prosecution⁴.

It will be seen in the next section (relating to probable cause) that this is an unsound view of the effect of the judgment⁵. But since conviction would show that the charge was not false, the prosecution could not have been wrongful; the person prosecuted has now to prove that he was not guilty,—conviction shows that he was guilty.

¹ Savill v. Roberts, 1 Ld. Raym. 374, Lord Holt.

² Chapter ix.

³ Fisher v. Bristow, 1 Doug. 215.

⁴ Parker v. Farley, 10 Cushing (Mass.), 279, 282; Dennehey v. Woodsum, 100 Mass. 195, 197; Morrow v. Wheeler & W. Manuf. Co., 165 Mass. 349; Castrique v. Behrens, 3 El. & E. 709. See Besébé v. Matthews, L. R. 2 C. P. 684; 1 Smith's Leading Cases, 258, 6th ed.

⁵ Thus it is held on sound principle, that an action for malicious prosecution against the present plaintiff, by proceedings against him in bankruptcy, may be maintained notwithstanding an adjudication against him, if this has been set aside. Metropolitan Bank v. Pooley, 10 App. Cas. 210.

Conviction is fatal even though the prosecution take place in a proceeding from which there is no appeal. Conviction in such a case is equally fatal with a conviction in a tribunal from the judgment of which the defendant has a right of appeal; since to allow the action for malicious prosecution would be (so it is deemed) virtually to grant an appeal. For example: The defendant procures the plaintiff to be arrested (falsely, maliciously, and without probable cause, as the latter alleges) and tried before a justice of the peace on a criminal complaint of assault and battery. The plaintiff (then defendant) is convicted, and no appeal is allowed by law. The defendant is not liable to an action for malicious prosecution¹.

It is often said that the plaintiff must have been acquitted of the charge preferred, to enable him to sue for malicious prosecution. But this is not always true; it is not true of civil suits (in the few cases of the kind to which the present subject applies), and of course it is not true of criminal proceedings in which there can be no conviction or acquittal².

It is not necessary to the termination of a civil suit such as will permit an action for malicious prosecution, that the suit should have gone to actual judgment, or even to a verdict by the jury. A civil suit is entirely within the control of the plaintiff, and he may withdraw and terminate it at any stage; and, should he take such a step, the suit is terminated. For example: The defendant (in the suit for malicious prosecution) writes in the docket book, opposite the entry of the case against the plaintiff, 'Suit withdrawn.' This is a sufficient termination of the cause for the purposes of the now plaintiff³.

It is not necessary indeed, according to American authority, that the party should make a formal entry of the withdrawal or

¹ *Besébé v. Matthews*, L. R. 2 C. P. 684.

² The term 'acquittal' has sometimes been used of cases in which there has been no more than a termination of preliminary proceedings with a discharge of the prisoner. In such cases no *acquittal* is necessary, as will be seen later; none is possible in such proceedings. When an acquittal in a prosecution for crime is really necessary, there must, it seems, be such a termination of the prosecution, in favour of the accused, as will enable him to plead the judgment in bar of another prosecution.

³ *Arundell v. White*, 14 East, 216.

dismissal of the suit, in order (without a judgment or verdict) to terminate it sufficiently for the purposes of an action by the opposite party. Any act, or omission to act, which is tantamount to a discontinuance of the proceeding has the same effect¹. For example: The defendant, having procured the arrest of the plaintiff in a civil cause, fails to enter and prosecute his suit. This is a termination of the proceeding².

If however the (civil) prosecution went to judgment, the judgment must have been rendered in favour of the defendant therein, in order to enable him to sue for malicious prosecution. Judgment against the defendant would conclusively establish the plaintiff's right of action; it could not therefore be treated as a false prosecution,—unless indeed it was concocted in fraud.

In a criminal trial the situation is indeed different. Such a proceeding is instituted by the Crown, and, when by indictment,

Criminal trials distinguished. is under the control of the Crown counsel; it is never under the control of the prosecutor.

He has no authority over it; and, this being the case, he cannot, in principle, be bound by the action of the prosecuting counsel. Should such counsel therefore enter a dismissal of the prosecution before the defendant, having been duly indicted, has been put in jeopardy, this act, it seems, gives no right to the prisoner against the prosecutor. The course of proceeding was not arrested by the prosecutor, and he has a right to insist that the law shall take its regular course, and place the prisoner in jeopardy, before he shall have the power to seek redress. For example: The defendant procures the plaintiff to be indicted for arson. The prosecuting counsel, failing to obtain evidence, enters a 'nolle prosequi' before the jury is sworn. The prosecution is not terminated in favour of the prisoner³.

If however the prosecution was arrested by the grand jury's finding no indictment upon the evidence, and the consequent discharge of the prisoner, this is an end of the prosecution, such as will enable him (other

No indictment found.

¹ *Cardinal v. Smith*, 109 Mass. 158; *Strehlow v. Pettit*, 96 Wisconsin, 22.

² *Cardinal v. Smith*, supra.

³ *Bacon v. Towne*, 4 Cushing (Mass.), 217.

elements present) to bring the action under consideration¹. And the same is true, it seems, when the prosecution is begun by complaint before a magistrate who has jurisdiction only to bind over or discharge the prisoner. The magistrate's entry that the prisoner is discharged entitles him, so far, to bring an action. And this is true, though the prosecutor withdraw his prosecution. In preliminary proceedings such as the foregoing there can be no conviction or acquittal. For example: The defendant prefers against the plaintiff a charge of forgery before a justice of the peace, who has authority only to bind over or discharge the prisoner. The justice's minutes contain the following entry: 'After full hearing in the case, the complainant withdrew his prosecution, and it was thereupon ordered' that the plaintiff be discharged. An action for malicious prosecution is now proper².

In none of the foregoing classes of cases has there been an acquittal of the party prosecuted, or anything tantamount in law to an acquittal. To be acquitted in a prosecution for crime (the only case calling for remark), the accused must have been put in jeopardy; but a state of jeopardy is not reached until the swearing of the petit jury. Hence if acquittal were necessary, an action for malicious prosecution could not be instituted upon the failure of the grand jury to find an indictment, or upon the discharge of a magistrate who has no power to convict. In neither case has the prisoner been in jeopardy. The fact appears to be that, notwithstanding the language of some of the judges, a termination of the proceedings with an acquittal, actual or virtual, is necessary only in case of an indictment or information against the prisoner. In other cases it is enough that the prosecution has been dismissed³.

¹ See *Byne v. Moore*, 5 Taunt. 187.

² *Sayles v. Briggs*, 4 Metcalf (Mass.), 421.

³ The rule requiring an acquittal of the party prosecuted runs back to the Statute of Malicious Appeals, already referred to. Westm. 2, c. 12 (13 Edw. 1). By this statute it was ordained that when any person maliciously 'appealed [that is, accused and prosecuted by the person injured] of felony surmised upon him, doth *acquit* himself in the King's Court in due manner,' &c., the appellor shall be imprisoned and be liable in damages to the injured party. A few years

By way of summary, the various rules of law may be thus stated: A civil suit is sufficiently terminated (1) when the plaintiff has withdrawn, or otherwise discontinued, his action; or (2) when judgment has been rendered in favour of the defendant. A criminal suit is sufficiently terminated (1) when the prosecution, if brought before a magistrate, has been dismissed, or (2) when, if preferred before the grand jury, that body has found no indictment; or (3) when, an indictment having been found, and the prisoner having been put in jeopardy, the prisoner has been acquitted in fact or in law. It seems however that the termination must not have been brought about out of course in favour of the defendant in the former prosecution, as by a compromise entered into with him, for he might have been convicted had the case gone on in the regular way.

**Summing
up of ter-
mination.**

§ 3. THE WANT OF PROBABLE CAUSE

Supposing the plaintiff to have begun his action after the termination of the prosecution, it then devolves upon him further to establish the defendant's breach of duty by showing that he instituted the prosecution without probable cause¹. And this appears

**What proba-
ble cause
means.**

later statutes were passed against conspiracies to indict persons maliciously. Bigelow's L. C. Torts, 190. Between these statutes and the statute first mentioned, and taking its shape from them, the action for malicious prosecution arose. The various statutes applied to cases of prosecutions for felony alone; in such cases it was provided that acquittal was necessary. Prosecutions for misdemeanours, prosecutions before inferior courts, and civil prosecutions have been left to the wisdom of the judges (except those falling within the Statute of Malicious Distresses in Courts Baron, which required proof only of malice and a false complaint. Bigelow's L. C. Torts, 192).

¹ *Turner v. Ambler*, 10 Q. B. 252. Under the early law this apparently was not true. Acquittal and malice made a presumptive case, according to the Statute of Malicious Appeals. Probable cause was a defence, but so far as it was distinguished from malice the burden of proof in regard to it seems to have been upon the defendant. See *Savill v. Roberts*, *Ld. Raym.* 374. It appears to have been considered as overturning the plaintiff's evidence of malice. After *Savill v. Roberts* (1699) the defendant had no need to prove probable cause if an indictment not involving scandal or loss of life or liberty had been found against the plaintiff; the plaintiff being 'constrained to show express malice and

to mean that he ought to show that no such state of facts or circumstances was known to him as would induce one of ordinary intelligence and caution to believe the charge preferred to be true. Or, conversely, probable cause for preferring a charge of crime is shown by facts, actual or believed by the prosecutor to be actual, which would create a reasonable suspicion in the mind of a reasonable man¹.

To act therefore on very slight circumstances of suspicion, such as a man of caution would deem of little weight, is to act without probable cause. For example: The defendant procures the arrest of the plaintiff upon a charge of being implicated in the commission of a robbery, which in fact has been committed by a third person alone, who absconds. The plaintiff, who has been a fellow-workman with the criminal, has been heard to say that he (the plaintiff) had been told, a few hours before the robbery, that the robber had absconded, and that he had told the plaintiff that he intended to go to Australia. The robber has also been seen, early in the morning after the robbery, coming from a public entry leading to the back door of the plaintiff's house. The defendant has no probable cause for procuring the arrest².

Probable cause however does not depend upon the actual state of the case, in point of fact, but upon honest and reasonable belief. Hence, though the prosecutor be in
Acting in bad faith. a situation to show that he had probable cause, so far as regards the strength of his information, still if he did not believe the facts and rely upon them in procuring the arrest, he has committed a breach of duty towards the person arrested. For example: The defendant goes before a magistrate and prefers against the plaintiff the charge of larceny, for which there was reasonable ground in the facts within the defendant's

iniquity in the prosecution.' *Savill v. Roberts*, Lord Holt. This would be done evidently by proving want of probable cause. The action for malicious prosecution was 'not to be favoured but managed with great caution,' in cases not involving scandal or loss of life or liberty. *Id.* This doctrine led the way for the modern rule requiring the plaintiff to prove want of probable cause in all cases.

¹ *Broughton v. Jackson*, 18 Q. B. 378; *Panton v. Williams*, 2 Q. B. 169, Ex. Ch.

² *Busst v. Gibbons*, 30 Law J. Ex. 75. Comp. *Lister v. Perryman*, L. R. 4 H. L. 521, as to hearsay.

cognizance. The defendant however does not believe the plaintiff guilty, but prefers the charge in order to coerce the plaintiff to pay a debt which he owes to the defendant. The defendant has acted without probable cause¹.

The question of probable cause is to be decided by the circumstances existing or supposed to exist at the time of the arrest, and not by the turn of subsequent events²; such at all events is the general rule. If the defendant had at that time such grounds for supposing the plaintiff guilty of the crime charged as would satisfy a cautious man, he violates no duty to the plaintiff in procuring his arrest, though such grounds be immediately and satisfactorily explained away, or the truth discovered by the prosecutor himself. For example: The defendant procures the plaintiff to be arrested for the larceny of certain ribbons, on reasonable grounds of suspicion. He afterwards finds the ribbons in his own possession. He is not liable³.

On the other hand, in accordance with the same principle, if the prosecutor was not possessed of facts justifying a belief that the accused was guilty of the charge, it matters not that subsequent events (short of a judgment of conviction, as to which presently) show that there existed, in fact, though not to the prosecutor's knowledge, circumstances sufficient to have justified an arrest by any one cognizant of them. He has violated his duty in procuring the arrest. For example: The defendant to an action for malicious prosecution shows facts sufficient to constitute probable cause, but does not show that he was cognizant of such facts when he procured the plaintiff's arrest. The defence is not good⁴.

It has however been declared in effect that, while acquittal is no evidence of want of probable cause, conviction is conclusive

¹ *Broad v. Ham*, 5 Bing. N. C. 722. Had the defendant believed the charge, would it have been material that he procured the arrest mainly for the purpose of getting his pay?

² *Delegal v. Highley*, 3 Bing. N. C. 950.

³ *Swain v. Stafford*, 4 Iredell (North Carolina), 392 and 398.

⁴ *Delegal v. Highley*, 3 Bing. N. C. 950.

of its existence¹; and this though the verdict is afterward set aside and, upon a new trial, an acquittal follows². But

this, it will be seen, is inconsistent with the **Conviction.** rule that the question of probable cause is to be determined by the state of facts within the prosecutor's knowledge (supposing him to have acted bona fide upon such facts) at the time of the arrest. Conviction does not, in point of fact, prove that the prosecutor at the time had reasonable grounds to suspect the guilt of the prisoner, such grounds, that is, as would have induced a cautious man to arrest the suspected person,—it simply proves that the prisoner is guilty; and he may have been found guilty though the prosecutor procured his arrest without reasonable grounds. It would, it seems, be more accurate to say that the old Statute of Malicious Appeals, which in reality lies at the foundation of the law concerning criminal prosecutions, by plain implication exempted the prosecutor (of felony) from liability in case of the conviction of the prisoner. It seems clear at all events that upon reversal of a conviction, followed by an acquittal, there is nothing in the conviction to prevent an action for malicious prosecution³.

There are other seeming anomalies relating to this phase of probable cause; one of them is found in the effect sometimes given to the action of the grand jury, or to that of a magistrate who has power only to bind over the accused for trial. That action has been said to furnish *prima facie* evidence in regard to probable cause, in a suit for malicious prosecution. For example: The now defendant prosecutes the now plaintiff before the grand jury, on a charge of larceny, and the grand jury throws out the bill. This is deemed *prima facie* evidence of want of probable cause in the present suit⁴.

¹ *Reynolds v. Kennedy*, 1 Wils. 232; *Sutton v. Johnstone*, 1 T. R. 493, 505, 506. So in direct terms in America. *Whitney v. Peckham*, 15 Mass. 243 (by a trial magistrate); *Parker v. Farley*, 10 Cush. 279, 282; *Morrow v. Wheeler & Wilson Co.*, 165 Mass. 349; *Dennehey v. Woodsum*, 100 Mass. 195, 197.

² *Whitney v. Peckham*, *supra*. Contra everywhere of simple *acquittal*.

³ *Comp. Metropolitan Bank v. Pooley*, 10 App. Cas. 210; ante, p. 84, n.

⁴ See *Nicholson v. Coghill*, 6 Dowl. & R. 12, 14, *Holroyd, J.*; *Broad v. Ham*, 5 Bing. N. C. 722, 727, *Coltman, J.*

There is ground for doubting the soundness of this doctrine. How can it be, it might be asked, that what is no evidence at all before the grand jury or the magistrate in the same case can be *prima facie* evidence before a petit jury in a different case? The grand jury or the magistrate does not consider what prompted the prosecutor, but whether there is now sufficient evidence to justify holding the accused further for trial. The contrary doctrine, at best, is a doubtful application of the rule of the relevancy of a later fact to prove an earlier.

Further, it has been seen¹ that in certain cases an action for a malicious civil suit may be brought. Now while it is **Discontinu-** held that the mere omission to appear and prose-
ance of suit. cute an action, whereby the defendant obtains a judgment of nonsuit, is no evidence of want of probable cause², it is deemed that a voluntary discontinuance, being a positive act, may show *prima facie* evidence of the same. For example (taking a case from the old law which permitted an arrest in an ordinary civil suit): The now defendant procures the now plaintiff to be arrested and held to bail in an action on contract. The case comes on for trial very shortly afterwards, and the plaintiff discontinues his suit. This is deemed *prima facie* evidence of want of probable cause³.

It is clear that the mere abandonment of the prosecution by the prosecutor, and the acquittal of the prisoner, are no **Abandonment** evidence of a want of probable cause⁴. Such
of prosecu- facts in themselves show nothing except that the
tion. prosecution has failed. It may still have been undertaken upon reasonable grounds of suspicion⁵. Still, the circumstances of the abandonment may be such as to indicate *prima facie* a want of probable cause. For example: The defendant presents two bills for perjury against the plaintiff, but does not himself appear before the grand jury, and the bills are ignored. He presents a third bill, and, on his own

¹ Ante, p. 83.

² *Sinclair v. Eldred*, 4 Taunt. 9; *Webb v. Hill*, 3 Car. & P. 485.

³ *Nicholson v. Coghill*, 6 Dowl. & R. 12; *Webb v. Hill*, 3 Car. & P. 485.

⁴ *Willans v. Taylor*, 6 Bing. 183.

⁵ The magistrate or grand jury decides whether there is reasonable ground for putting the prisoner upon trial; the petit jury decides whether the prisoner is guilty.

testimony, the grand jury return a true bill. The defendant now keeps the prosecution suspended for three years, when the plaintiff, taking down the record for trial, is acquitted; the defendant declining to appear as a witness, though in court at the time and called upon to testify. These facts indicate the absence of probable cause¹.

If the prosecutor takes the advice of a practising lawyer upon the question whether the facts within his knowledge are such as to justify a complaint, assuming that he **Acting on legal advice.** has honestly stated such facts and acts bona fide upon the advice given, he will be protected even though the counsel gave erroneous advice. That is, he will be protected, though he might not have been in possession of facts such as would have justified a prosecution without the advice. For example: The defendant states to his attorney the facts in his possession concerning a crime supposed to have been committed by the plaintiff. The attorney advises the defendant that he can safely procure the plaintiff's arrest. The defendant is not liable, though the facts presented did not in law constitute probable cause².

The prosecutor must however, as the proposition itself states, act bona fide upon the advice given, if he rest his defence upon such a ground alone³. For example: The defendant procures the arrest of the plaintiff, having first taken the advice of legal counsel upon the facts. This advice is erroneous, and it is not acted upon in good faith believing it to be correct; the arrest being procured for the indirect and sinister purpose of compelling the plaintiff to sanction the insurance of certain illegal bonds. The defendant is liable⁴.

If, after taking legal advice and before the arrest, new facts come to the knowledge of the prosecutor, he cannot justify the arrest as made on advice, unless such new facts are consistent with the advice which has been given. If they should be of a contrary nature, casting new doubt upon the party's guilt, the

¹ Willans v. Taylor, 6 Bing. 183.

² Snow v. Allen, 1 Stark. 502.

³ Ravenga v. Mackintosh, 2 B. & C. 693.

⁴ Ravenga v. Mackintosh, supra. See Hewlett v. Cruchley, 5 Taunt. 277, 283.

prosecutor cannot safely proceed to procure an arrest except upon new advice ; unless indeed the entire chain of facts in his possession shall satisfy the court that there existed a reasonable ground for his action. To make use of the advice given, when the new facts indicate that the accused is not guilty, would not be to act upon the advice in good faith¹.

Again, if the only defence be that the prosecutor acted upon legal advice, a breach of duty may still be made out if it appear that the prosecutor untruly stated to the counsel the facts within his knowledge. The plaintiff's case, so far as it rested on the proof of want of probable cause, would be established by showing that the actual facts known to the prosecutor (differing from those on which the advice was obtained) showed that he had no reasonable ground for instituting the prosecution.

The result is, that the defence of advice of legal counsel, to establish probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose ; and the statement made at the time by the prosecutor to his counsel must be full and true, and consistent with that purpose.

This defence of having acted upon legal advice is, according to American authority, a strict one, confined to the case of advice obtained from lawyers admitted to practise in the courts². Such persons are certified to be competent to give legal advice, and their advice when properly obtained and acted upon is conclusive of the existence of probable cause. But if the prosecutor act upon the advice of a person not a lawyer, and therefore not declared competent to give legal advice, the facts must be shown upon which the advice was obtained, however honestly and properly it was sought and acted upon. It is not enough, by the better view, that the advice was given by an officer of the law, professing familiarity

¹ See *Fitzjohn v. Mackinder*, 9 C. B. N. s. 505, 531, Ex. Ch., Cockburn, C. J.

² It is held in *Cole v. Andrews*, 74 Minnesota, 93, that the relation of attorney and client must exist between the person asking and the person receiving the advice to make the case one of probable cause ; which is contra to *Hess v. Oregon Co.*, 31 Oregon, 503, to *Wenger v. Phillips*, 195 Penn. St. 214, and to *Oliver v. Pate*, 43 Indiana, 132. The last named case is denied in *Cole v. Andrews*. The cases cited are cases of advice given by prosecuting counsel. See also *Williams v. Casebeer*, 126 California, 77, advice by a police judge.

with its principles, if such person were not a lawyer. For example: The defendant procures the arrest of the plaintiff upon advice of a justice of the peace, with whom he has been in the habit of advising on legal matters; but the justice is not a lawyer. This is not evidence of probable cause¹.

The want of probable cause is not to be inferred merely *because* of evidence of malice, since a person may maliciously prosecute another against whom he has the strongest evidence; whom indeed he may have caught in the commission of the crime². There must be some evidence indicating that the prosecutor instituted the suit under circumstances which would not have induced a cautious man to act.

Malice does not show probable cause.

It should be observed finally that it may be necessary for the plaintiff, even in a jury case, to convince the *judge* of the want of probable cause upon the facts proved. The facts material to the question of probable cause must be found by the jury; but the judge may have to decide whether the facts so found establish probable cause or want of it. That is a question of law³.

Action of the judge.

§ 4. MALICE

To make out a breach of duty by the defendant, the plaintiff must also produce evidence that the prosecution was instituted with express or actual malice towards the accused⁴. Malice is not to be inferred merely *because* of proof of a want of probable cause, any more than want of probable cause is to be inferred merely because of proof of malice; it may be inferred as a *fact* from want of probable cause, but it is not a necessary inference. A man may institute a prosecution

Express malice necessary: want of probable cause: malice a question of fact.

¹ *Beal v. Robeson*, 8 Iredell, 276 (North Carolina). But see *Williams v. Casebeer*, 126 California, 77.

² *Turner v. Ambler*, 10 Q. B. 252, 257.

³ *Panton v. Williams*, 2 Q. B. 169, Ex. Ch.; *Lister v. Perryman*, L. R. 4 H. L. 521; *Abrath v. Northeastern Ry. Co.*, 11 App. Cas. 247.

⁴ *Mitchell v. Jenkins*, 5 B. & Ad. 588.

against another without malice either in the legal or the popular sense, though he had no sufficient ground for doing so.

The jury must be allowed, and it is their duty, to pass upon the question of malice as a distinct matter. There is therefore no such thing in the law of malicious prosecution as implied malice or malice in law¹. For example: Evidence having been introduced in an action for a malicious prosecution, which showed that the defendant had instituted the prosecution without probable cause, the judge instructs the jury that there are two kinds of malice, malice in law and malice in fact, and that in the present case there was malice in law because the prosecution was wrongful, being without probable cause. This is erroneous; the existence of malice is a question for the jury².

§ 5. DAMAGE

If the charge upon which the prosecution was instituted was such as (being untrue) would have constituted actionable slander had it not been preferred in court, the plaintiff, upon proof of the termination of the prosecution, the want of probable cause, and malice, has made out a case, and is entitled to judgment. It is not necessary for him to prove that he has sustained any pecuniary damage. For example: The defendant causes the plaintiff to be indicted for the stealing of a cow, falsely, without probable cause, and of malice. The plaintiff is entitled to recover without producing evidence that he has sustained any actual damage³.

But it has been decided that it is only for the prosecution of a charge the mere oral imputation of which would constitute actionable slander that the institution of the prosecution can be actionable without damage⁴. For example: The defendant falsely prefers against the plaintiff a simple charge of assault and battery, without cause and with malice. The plaintiff

¹ Mitchell v. Jenkins, 5 B. & Ad. 588.

² Id.

³ See Byne v. Moore, 5 Taunt. 187, Mansfield, C. J.

⁴ Byne v. Moore, supra. See Quartz Hill Mining Co. v. Eyre, 21 Q. B. Div. 674, 692.

cannot recover for a malicious prosecution without proof of special damage¹.

It follows that this action for a malicious prosecution cannot be maintained without proof of damage when the prosecutor has procured the indictment of the plaintiff for the commission of a wrong which is not a criminal offence involving scandal or loss of life or liberty, much less where an indictment preferred for an offence not scandalous has been thrown out by the grand jury. For example: The defendant maliciously and without probable cause procures the plaintiff to be arrested for an assault (not scandalous), whereupon the plaintiff gives bail for appearance at the next general quarter sessions. At such sessions the defendant procures an indictment to be preferred against him for the supposed assault; the grand jury return 'not found' to the indictment; and the plaintiff and his sureties are discharged. The plaintiff cannot recover without proving special damage².

§ 6. WANT OF JURISDICTION, ETC.

If the prosecution fail by reason of the fact that the court in issuing its warrant exceeded its jurisdiction, or that the
What action proper. warrant or indictment was defective, the question may arise whether the accused should sue for malicious prosecution, for false imprisonment if there was an arrest, or for slander if the charge was defamatory. In certain cases it is plain that he may bring an action for false imprisonment; for which the reader is referred to the chapter on that subject. It would give him an obvious advantage to sue for slander, since then he would not be compelled to prove a want of probable cause or the existence of malice; it may be that that remedy is applicable³. The ordinary remedy against the prosecutor appears to be an action for malicious prosecution⁴ unless the prosecutor participated in making a false arrest.

¹ Byne *v.* Moore, *supra*.

² *Id.* It will be noticed that the mere arrest and having to procure bail do not amount to special damage.

³ See Bigelow's *Leading Cases on Torts*, 205, and cases cited.

⁴ *Pippet v. Hearn*, 5 B. & Ald. 634. *Contra* in Massachusetts, *Bixby v. Brundige*, 2 Gray, 129. If the supposed court was no court known to the law,

§ 7. KINDRED WRONGS

In connection with malicious prosecution there is a whole group of kindred wrongs, kindred in name at least, which deserve to be distinguished and explained; to wit, **Kindred wrongs named.** wrongs of malicious arrest, malicious attachment or execution, malicious search, and malicious abuse of process,—and perhaps others.

These wrongs differ as a whole from malicious prosecution in this, that while the prosecution in the last-named wrong is an original proceeding, the arrest, attachment, execution, or other act in these kindred wrongs is usually a secondary or ancillary proceeding in some original action which may have been perfectly lawful. It will be assumed accordingly that the original proceeding in these cases was lawful. How these wrongs severally differ from malicious prosecution will now be seen.

Malicious arrest as a tort differs from malicious prosecution in perhaps two particulars touching the proof required to make a cause of action, to wit, malice and the termination of the prosecution or suit.

In regard to malice, it appears to be enough that the arrest was wrongful,—in what way is probably immaterial. **Malice: probable cause.** Thus it appears to be enough that the arrest was without probable cause; malice, if that is true, being only a fiction and not a distinct entity requiring proof¹. If however malice as an entity must actually be proved, as for instance by evidence that the defendant procured the arrest with knowledge that there was no probable cause for it², there is no difference, in point of malice, between the two wrongs. However that may be, it is clear that malice, in whatever sense, would not make an arrest wrongful, if there was probable cause for it; there is no difference between the two wrongs in that particular.

as e.g. if it was only some self-constituted body like a 'vigilance committee,' an action for defamation could certainly be maintained.

¹ As to malice as an entity and malice as a fiction, see ante, pp. 16-22.

² Ante, p. 17.

In regard to the termination of the prosecution, it is laid down that an action for a malicious arrest under secondary process cannot be brought until the *original* Termination. prosecution or action has come to an end¹. It is not easy to understand this rule; it should seem to be enough that the warrant has been set aside, if any termination of proceedings be necessary. Thus if a man has been wrongfully arrested in an action on contract, he ought, it seems, to be entitled to sue at once upon discharge for any damage he has sustained, and not compelled to wait the event of the original action². The chief reason for requiring a termination of the prosecution, in suits for malicious prosecution, to wit, that otherwise there might be inconsistent judgments, is not true of the case in question; judgment that the defendant procured the *arrest* wrongfully cannot be inconsistent with the right of that party to judgment on the contract. Such is the American doctrine in regard to malicious attachment³, as will be seen; and it may well be doubted whether there is any ground for a distinction on this point between the two cases.

Damage must no doubt be proved unless the arrest was procured by defamatory allegations which as slander would be actionable *per se*. There appears to be no Damage. difference between cases of malicious arrest and malicious prosecution in that respect.

To sum up: In an action for a malicious arrest the plaintiff has to prove want of probable cause, the termination of the proceeding in which the arrest was made,—and probably of the original proceeding,—and damage or not, according to the nature of the allegations made in procuring the arrest. If the process was void on its face, the case is one for an action for false imprisonment⁴.

¹ *Jenings v. Florence*, 2 C. B. N. S. 467; *Grainger v. Hill*, 4 Bing. N. C. 212, *Tindal*, C. J. *Jenings v. Florence*, the later of these cases, merely recites a termination of all proceedings; but in *Grainger v. Hill* it is said that the original suit must have terminated. For other cases in regard to malicious arrest, see *Daniels v. Fielding*, 16 M. & W. 200; *Gibbons v. Alison*, 3 C. B. 181; *Phillips v. Naylor*, 4 H. & N. 565.

² See *Swift v. Witchard*, 103 Georgia, 193, 196.

³ *Zinn v. Rice*, 154 Mass. 1.

⁴ See the chapter on that subject for the nature of such an action.

Malicious attachment as a tort appears to be very similar. Malice as a distinct entity, at least as motive, is no necessary part of the cause of action, though it may well be present and strengthen a case already made. **Malice:**
probable be present and strengthen a case already made.
cause: ex- An attachment of property could not be wrongful
cessive levy. simply because it was procured by malicious motives. What must be proved is want of probable cause, as by evidence that the attachment was manifestly excessive, and damage; and that is all, unless knowledge of want of probable cause is required.

It is not necessary in America for the plaintiff (defendant in the original suit and attachment) to await the result of the original action; enough that the malicious attachment has worked damage to the plaintiff. The rule in malicious prosecution requiring a termination of the original proceedings is, by its terms and nature, limited to prosecutions 'to establish a charge or cause of action, and cannot include an ex parte use of process incidental and collateral' thereto, 'in defence to which the falsity of the charge cannot be shown¹.' Hence there is no inconsistency between the suit for the malicious attachment and the suit in which the attachment was made.

Where attachment of property is procured under statutory authority only, the attaching party's justification must of course be found in the statute. Whether the **Statutory**
attachment. act is wrongful or not, and what must be proved to make a cause of action, will be determined accordingly.

In regard to malicious execution, little need be said². Malice as motive could not make the levy wrongful; a manifestly excessive levy would be wrongful, but it would be wrongful only in respect of the excess (supposing the subject severable) and of any damage done. For such damage the officer would be liable accordingly; the plaintiff in the execution also, if he directed or participated in the wrong. The action, whether in such a case, or for

¹ *Zinn v. Rice*, 154 Mass. 1, W. Allen, J.

² See *Churchill v. Siggers*, 3 El. & B. 938; *Jenings v. Florence*, 2 C. B. N. S. 467; *Craig v. Hasell*, 4 Q. B. 481.

levying execution of a judgment known to be satisfied¹, would naturally be for a wrongful taking of property,—trespass, conversion, or the like,—a very different wrong from that for a malicious prosecution².

Malicious search is, it seems, a common-law wrong. In America it is in terms a constitutional offence, taking that form on or after the separation of America from England, because of differences which had arisen between the colonies and the mother country over search warrants³. The fourth amendment to the Constitution of the United States provides that ‘no warrants shall issue but upon *probable cause*, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.’ This is only a solemn declaration of the English common law, except as it formerly applied to writs of assistance in the Exchequer. What must be proved to set aside the warrant, or to make a cause of action if the warrant has done its work, is indicated by the quotation; though if the warrant was absolutely void, the wrong will be trespass or conversion.

In the last of these kindred wrongs, malicious abuse of process, process which in itself may have been lawful has been perverted to a purpose not contemplated by it. In other words the exigency of the writ has not been followed. Malice again, as a distinct entity, probably plays no part in the case; all that appears to be required for a cause of action is proof that the writ has been applied to a purpose not named or implied by it, to the damage of the plaintiff. Perversion or ‘abuse’ of the process gives the name ‘malicious’ to the case; the malice is fictitious, or may be.

It is not necessary for the plaintiff to wait the termination of the original proceeding or, since the process has not been

¹ *Deyo v. Van Valkenburgh*, 5 Hill (New York), 242.

² See later chapters.

³ As writs of ‘assistance’ of government officers. These were writs of the Exchequer, in aid of the revenue officers. As to the objections to them see *Paxton’s Case*, Quincy (Mass.), 51, and the learned note thereto by Hon. Horace Gray, late a justice of the Supreme Court of the United States.

followed, to prove that there was no probable cause for the issuance of the particular process. For example: The defendant, under a warrant, according to law, for the arrest of the plaintiff in an action of debt, makes use of the same to extort property from the plaintiff, in which he succeeds, to the damage of the plaintiff. The plaintiff sues for the loss while the action of debt is pending, and without alleging want of probable cause. He is entitled to recover¹.

Recent decisions have also brought to light the existence of a right of action for maintenance². This is a tort founded upon early statutes making maintenance a criminal offence³; an action for damages being permitted only where the defendant has aided the prosecution of some suit in which he had no interest or, it seems, motive other than that of stirring up or keeping alive strife. It has lately been decided that if the defendant's conduct was based on charity, reasonable or not, the action will fail⁴.

¹ *Grainger v. Hill*, 4 Bing. N. C. 212. The original suit itself was premature, the debt not being due; but that made no difference.

² *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; *Harris v. Brisco*, 17 Q. B. Div. 504; *Metropolitan Bank v. Pooley*, 10 App. Cas. 210.

³ It is thought doubtful if a corporation can be liable for the offence. 10 App. Cas. at p. 218, Lord Selborne.

⁴ *Harris v. Brisco*, *supra*.

PART II

UNLAWFUL ACTS

BREACH OF ABSOLUTE DUTY

CHAPTER IV

PROCURING REFUSAL TO CONTRACT

Statement of the duty. *A* owes to *B* the duty not, by wrongful means, to procure *C* to refuse, to *B*'s damage, to contract with him (*B*), if *B* desires to contract with *C*.

§ 1. WHAT MUST BE PROVED

The use of wrongful means may for the present be dismissed with a word. Every man has by law a right to endeavour to enter into contract with others, and for any one to use wrongful means, successfully and with damage, to prevent the accomplishment of the endeavour would be an infringement of that right, and therefore a tort. It will be necessary to return to the subject later, in considering combinations to prevent contract. It remains to consider maliciously procuring refusal to contract, where no wrongful means are brought to bear¹.

Freedom of contract: interference by wrongful means.

§ 2. MALICE

Until recently it was an open question whether an action lies for maliciously procuring one man to *refuse* to contract with another, where the latter suffered damage thereby. There were strong dicta that an action was maintainable in such a case². But in the year 1898

Change in the current of authority.

¹ There is much conflict of authority on this point in America. Among the cases denying any right of action, see *Rice v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11; *Boyson v. Thorn*, 98 California, 578. Among cases contra, *Walker v. Cronin*, 107 Mass. 555; *Plant v. Woods*, 176 Mass. 492.

² *Temperton v. Russell*, 1 Q. B. 715; *Bowen v. Hall*, 6 Q. B. Div. 333.

the doctrine was repudiated, decisions and dicta to the contrary being reversed or overruled by the House of Lords, and the contrary plainly laid down¹.

Malice in such cases is to be taken in any sense of the word which does not import the use of wrongful means. It may accordingly be laid down that no action lies for procuring a man to refuse to contract with the plaintiff, where there was no duty to contract, though the procuring was done with notice of the plaintiff's desire to contract and with intent to do him harm, if no wrongful means was employed. For example: The defendants maliciously, but without using wrongful means otherwise than by informing the Glengall Iron Company of the determination of their union men to leave the service of that company unless the plaintiffs, non-union men, are discharged, procure the Glengall Iron Company, which theretofore had been employing the plaintiffs by the day, to refuse at the end of a certain day to continue to employ them, the refusal not being a breach of contract or other legal duty by the company. The employment would have continued but for what the defendants did; and the plaintiffs have suffered damage. The defendants are not liable, whatever may have been their motive. They had a legal right to procure the Glengall Iron Company, in the way they did, to refuse to renew the employment of the plaintiffs, and malice on their (the defendants') part towards the plaintiff could not convert that right into a legal wrong².

The 'right to contract,' of common speech, plainly is no answer to this doctrine. The phrase is too broad. *A* has no legal right to contract with *B*, since *B* may refuse. *A* has only a legal right to try to induce *B* to contract with him³. But *C* has a like legal right,

Maliciously
procuring re-
fusal to con-
tract, without
use of wrong-
ful means.

Meaning of
right to
contract.

¹ *Allen v. Flood*, 1898, A. C. 1, reversing *Flood v. Jackson* and overruling (on that point) dicta *Temperton v. Russell*, *supra*, and in *Bowen v. Hall*, 6 Q. B. Div. 333, 337, Brett, L. J.

² *Allen v. Flood*, 1898, A. C. 1.

³ That men have a legal right to refuse to contract, for instance to say that they will not work with men of a particular organization, or of no organization, has scarcely been doubted; it is now at least beyond dispute. *Quinn v. Leatham*, 1901, A. C. 450, 538; *Allen v. Flood*, *supra*.

a right to try to induce, and hence to induce, *B* to contract with *him* in the matter; that is, it is held, he has a legal right to induce *B* not to contract with *A*¹. That being the case, it seems that it should make no difference what *C*'s motive may be, whether the good motive of desiring to have *B* contract with *him* or the bad motive of wishing to injure *A*. 'A man has a [legal] right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium².'

§ 3. COMBINATIONS: MEANS

Would it affect the case if *C* were joined by others; that is, would it give a right of action to *A* that two or more persons conspired in inducing *B* to refuse to contract with him, with intent to injure *A*? The question is one of difficulty, but it seems that it should be answered in the negative. There would only be a conspiracy to do a lawful thing (if *C* alone did it, it would not be unlawful, as we have seen), unless the combination itself amounts to the use of 'means.' If to combine be to use 'means,' then the combination or conspiracy may be using wrongful means, and hence, if attended with damage, be unlawful.

To combine in bringing about the object is plainly to use means in one sense of the word; and it is certain that two or more may be able to do harm and so make themselves liable for the damage, where one might not be equal to it³. An organ-grinder and monkey before one's window might not be a nuisance, but fifty organ-grinders and monkeys undoubtedly

¹ See *Allen v. Flood*, supra, Lord Herschell. The question is not merely whether *A* has a legal right, but whether *C* has infringed that right; this he has not done if he had a legal right to do what he did.

² *Allen v. Flood*, at p. 138, per Lord Herschell.

³ *Lambton v. Mellish*, 1894, 3 Ch. 163; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25, 38, 45, 52, 60; s. c. 23 Q. B. Div. 598, 616, 624. *Lambton v. Mellish* was a case of rival caterers in a public place, trying to outdo each other by 'maddening' noises in getting business.

would be. Or to give the classical illustration, one man probably could not hiss an actor off the stage, but a hundred men might do it¹.

The inference has been drawn that to combine and conspire is to use 'means' within the rule under consideration². But the inference is hardly justified. The unlawfulness of the result, where the result is unlawful, is due, not to the means employed, except incidentally, but to doing the act itself, that being a nuisance, trespass, or the like; which would be equally unlawful if done by one person, if one could do it. 'Means,' in the sense of the rule, appears to denote measures, such as misrepresentation, used to bring to pass a result which one person might thus accomplish; it denotes 'measures, not men'³. Combinations may well *result* in coercion, but they do not of themselves amount to coercion or anything else which is wrongful⁴.

But a case of malice no doubt may easily be turned into a case of means. *A* does an act with intent to harm *B*; that is a plain case of malice. But *A* does the act with intent to harm *B*, in order to bring him to terms with himself, *A*, *A*'s motive being gain to himself; that is quite as plainly a case of the use by *A* of means to accomplish his purpose. The question then is, whether or not the means are wrongful⁵.

In the case of a combination of men the means employed may the more easily be wrongful, not indeed (as has already been observed) because the doing of an act by one man would not be unlawful when the doing of it by several would be unlawful, but only because

**Combina-
tions: acts of
one person.**

¹ *Gregory v. Brunswick*, 6 Man. & G. 205, 953.

² *Temperton v. Russell*, 1893, 1 Q. B. 715, Lords Esher and Ludlow. See also the intimation of Lord Watson in *Allen v. Flood*, 1898, A. C. 1, 108.

³ That conspiring to do an act, which is done, is not unlawful as means unless the act would be so without any conspiracy, see *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25; *Allen v. Flood*, *supra*. The suggestion that conspiracy itself is means is new.

⁴ Strikes are not in themselves unlawful. *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25, 47; *Farrar v. Close*, L. R. 4 Q. B. 602, 612.

⁵ Accordingly *Temperton v. Russell*, though treated by the court as a case of malice, should have been treated as one of means, regardless of the alleged conspiracy. The true question, it seems, was of the quality of the acts done by the defendants, whether rightful or wrongful. So easy is it to conceal means under a garb of malice. See *Quinn v. Leatham*, 1901, A. C. 495, 535.

one man alone might not be able to do what several together could do. Thus the threat of one man, acting for himself alone, to call out another man's servants from work might well be powerless, when if the threat were made by a company of men, as by a trade union, or by one man on behalf of the company, the threat might be effective enough; it would certainly be more apt to be effective than if made by but one man alone¹; added power of course is the very object of combination.

Accordingly a cause of action might well arise in the case of a combination of the kind; damage caused in that way would be a violation of legal right,—not because of malice, but because the measures taken would be wrongful. For example: The defendants are officers of a trade union of butchers. The members of the union have adopted a rule that they will not work with non-union men, or cut up meat coming from a place where non-union men are employed. The plaintiff is a butcher, not a member of the union, and has men in his employ who are not union men. By invitation of the secretary of the union he attends a meeting of the union, the defendants also being present. The plaintiff now offers to pay whatever is required to enable his men to become members of the union, but the offer is rejected in anger², and a vote passed to call out the plaintiff's men. A threat is also made and afterwards carried out to call out the men of a customer of the plaintiff, who supplies the plaintiff with meat; the result of which is that, though the customer wishes to continue to supply the plaintiff, he now stops doing so. These proceedings against the plaintiff are forwarded or taken by the defendants. 'Black lists' are also circulated through the plaintiff's neighbourhood by several of the defendants, holding up to odium the plaintiff and those

¹ 'My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce.' Lord Lindley, in *Quinn v. Leatham*, 1901, A. C. 495, 538.

² One of the defendants, in reply to the offer, said that the men should be put out of the plaintiff's employment, 'and should walk the streets for twelve months.' But it is plain that the action of the House of Lords would have been the same had there been no evidence of malice.

who dealt with him, as a warning against dealing with him. The plaintiff suffers damage from all this. The defendants are liable, so far as they participated in what was done¹; they were not acting upon their own legal rights—they were dictating to the plaintiff and his customers and servants what they were to do; they owed the duty to the plaintiff and his men to leave them in undisturbed enjoyment of liberty of action; and the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of that duty and of the plaintiff's rights².

In the case just stated the House of Lords reaffirms the doctrine that an act otherwise lawful³, although harmful, does **Malice does not overturn right: justification of competition.** not become actionable by being done maliciously in the sense of proceeding from a bad motive and with intent to annoy or harm another⁴. It was not then that the acts in question were malicious, they were wrongful in that they were wrongful measures. They were not done of legal right; there was no justification for them. It should be noticed then that what the defendants did was not considered as falling within the designation of competition, that is lawful competition; it was laid down in terms that 'competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed⁵.' For the defendants to seek to strengthen themselves for future contests with capital, so as especially to secure higher wages for union men, would no doubt be competition; but like other rights, the right of competition must be exercised lawfully. To compel employers, by threats and such like means, to call out their men was not lawful competition⁶.

¹ The appellant Quinn did not participate in the circulation of the black lists.

² *Quinn v. Leatham*, 1901, A. C. 495. See especially the language of Lord Lindley at pp. 537, 539, here used in effect.

³ Of legal right, as distinguished from bare permission. See ante, p. 9.

⁴ *Quinn v. Leatham*, at p. 533.

⁵ Id. p. 539.

⁶ Compare *Vegelehn v. Guntner*, 167 Mass. 92, of picketing of a kind held unlawful, Holmes, J., dissenting.

It should also be particularly noticed that the House of Lords drew a clear distinction between inducing employers to discharge their men at the end of a contract, by threats, and inducing them to do so by merely giving them notice of a determination of the men to leave if their wishes are not complied with. In the former case coercion in effect is used, and, as that fairly imports, in regard to men who did not desire to leave; in the latter case there may be nothing like coercion—there is only a statement of fact. The decision of the House of Lords in 1898¹ must then be understood accordingly².

Notice of
a fact dis-
tinguished.

Another distinction taken in the later case should also be noticed, to wit, in regard to the effect given to the evidence in the previous one. A decision had indeed been made in the prior case in regard to the defendant's conduct—it had been considered that all that the defendant did was to inform the employers of the plaintiffs that most of the employers' men would leave them if they did not discharge the plaintiffs. But it was now pointed out that the question what the defendant did was only a question of fact, and no court or jury could be bound as matter of law to reach the same conclusion³.

Finally it should be noticed that the House of Lords decides that every man has the right to earn his own living in his own

¹ *Allen v. Flood*, 1898, A. C. 1.

² Lord Lindley draws the distinction clearly. 'I am aware,' said he in *Quinn v. Leatham*, at p. 537, 'that in *Allen v. Flood* Lord Herschell [at pp. 128, 138] expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike by calling them out when they do not want to strike, I am unable to concur with him.'

It may be remarked that the same distinction has been taken in *Massachusetts v. Rice v. Albee*, 164 Mass. 88; but it has since been denied, assuming that the information, though true, was 'malevolent' and given to persuade. *Moran v. Dunphy*, 177 Mass. 485; *Plant v. Woods*, 176 Mass. 492. But the last-named case was a clear one for redress, on the footing of *Allen v. Flood* or of *Quinn v. Leatham*.

³ Lord Lindley in *Quinn v. Leatham*, at pp. 533, 534.

way, provided he does not violate some special law or infringe the rights of others; that this imports that a man may deal with others who are willing to deal with him; and that there is in consequence a correlative duty on the part of others not to prevent the free exercise of this right, except so far as their own similar rights may justify, for of what use would a man's right be to deal with others if any one might at will prevent him¹?

On the other hand one man or several men in concert may, within the legal right to deal or not to deal with others, threaten to refuse to contract with another, what-
Right of earning one's livelihood. ever the motive. The motive may be stated in terms to harm the plaintiff, as by inducing the one threatened not to enter into contracts with him, and the threat may be successful in that particular, to the plaintiff's damage, but no action can be maintained². There is no coercion in such a case, in any unlawful sense—coercion is not necessarily unlawful—for the persons threatening may lawfully refuse their custom, regardless of consequences. The consequences, though intended, of a lawful act cannot be unlawful towards those who do such act.

The foregoing remarks dispose of a distinction sometimes thought to exist in regard to malicious injury to a man's occupation, profession or way of getting a livelihood³. Such cases cannot now be considered to stand upon any special footing of liability⁴.

¹ Lord Lindley in *Quinn v. Leatham*, at p. 534.

² *Scottish Cooperative Society v. Glasgow Fleishers' Association*, 35 Sc. L. R. 645; *Quinn v. Leatham*, at p. 639.

³ In *Keeble v. Hickeringill*, 11 East, 574, note, much discussed and approved by many of the judges in *Allen v. Flood* (and approved in America in *Walker v. Cronin*, 107 Mass. 555), Lord Holt says that 'where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases.'

⁴ *Allen v. Flood*, 1898, A. C. 1, at pp. 132-136, Lord Herschell.

CHAPTER V

PROCURING BREACH OF CONTRACT

Statement of the duty. *A*, having knowledge or notice of the existence of a contract between *B* and *C*, owes the duty to *B* not to procure *C* to break his contract, to *B*'s damage.

It should be remembered that cases of this kind, though nominally cases of malice, are not such in reality. The knowledge or notice of the relation, called 'malice,' is only a necessary part of the breach of duty complained of in the sense that danger must be observed or observable (in ordinary cases) to create liability¹. Proof of malice as a distinct entity is not necessary². The case therefore belongs to this Part II., Unlawful Acts regardless of means or malice.

From very early times it has been actionable by the common law of England for one to entice away another's servants, with notice of the employment; though the term 'servant' at first was used to designate a person employed in menial service³, that is, one living with the master as a member of his household or

Enticing servants away: extension of idea of service.

¹ Ante, pp. 12, 13.

² *Allen v. Flood*, 1898, A. C. 1, 121-123, 154.

³ The term was not applied to the master's children, though they were and are in law his servants, of his household. See *Taylor v. Neri*, infra. The secondary meaning of 'menial' became the common meaning long ago.

In early times of English vassalage a man's menial servants were so much part of his own station in life, or status, that merely to entice them away appears to have been actionable. Compare Bigelow's L. C. Torts, 227, 290, 291. Secus of his children, until still earlier times of serfdom. *Taylor v. Neri*, infra. But to seduce his daughter was trespass until the nineteenth century.

family. But that was because there was then little if any service that was not of that kind¹. When in process of time there came to be much service in which the servants were not members of the master's household, the rule was extended accordingly and deemed to apply to all cases in which the relation of master and servant existed; though for a time not without question². The extension of the rule is now well settled³.

§ 1. MASTER AND SERVANT: WHAT MUST BE PROVED

The plaintiff has to prove the enticement from service, with notice, to his damage. Such evidence will entitle him to recover.

Notice and damage.

For example: The defendant entices away from the plaintiff's employment the plaintiff's journey-men shoemakers working by the piece and not 'menial' servants, with notice of their relation to the plaintiff, to the plaintiff's damage. The defendant is liable⁴. Again: The defendant entices away from the plaintiff's employment, with notice thereof, the plaintiff's piano workmen working by the piece and not being menial servants, to the plaintiff's damage. The defendant is liable⁵. Again: The defendant entices away the plaintiff's workmen employed under contract generally and

¹ The Statute of Labourers of 25 Edw. 3, stat. 1, may be noticed. The statute grew out of the lack of labourers caused by the plague, and accordingly related to ploughmen and others doing menial service. This has sometimes been supposed to be the origin of the master's right against third persons, but that is now considered a mistake. The statute was repealed, but the master's right of action has continued, without legislation, to this day. The Statute of Labourers simply added to the law certain provisions not of the common law, as in regard to harbouring servants. See *Lumley v. Gye*, 2 El. & B. 216, *Wightman, J.*

² See *Ashley v. Harrison*, 1 Peake, 194; s. c. 1 Esp. 48; *Taylor v. Neri*, 1 Esp. 386. In the second case, an action for assaulting an opera singer whereby the plaintiff lost his service, *Eyre, C. J.*, said that he did not think the law extended beyond menial servants, and pointed out that a father could not maintain an action for merely enticing away of his daughter per quod servitium amisit.

³ See *Lumley v. Gye*, 2 El. & B. 216; *Crompton, J.*; *Hart v. Aldridge*, 1 Cowp. 54; *Gunter v. Astor*, 4 J. B. Moore, 12.

⁴ *Hart v. Aldridge*, 1 Cowp. 54, a case often followed.

⁵ *Gunter v. Astor*, 4 J. B. Moore, 12.

not as menial servants, in the manufacture of boots and shoes, with notice of the employment, to the plaintiff's damage. The defendant is liable¹.

It matters not in cases of a binding engagement to service that the servant had not yet entered upon the performance of the service at the time of the enticement or seduction. If by the terms of the contract or the apprenticeship (for there is no difference between an ordinary contract of hiring and an apprenticeship, so far as the present subject is concerned) the master has a right to require performance of the services at the time of the enticement, he has a right of redress for a wrongful interference with that right. For example: The defendant induces the plaintiff's gardener to refuse altogether to carry out his engagement to make the plaintiff's gardens, though the gardener, owing to dissatisfaction with his engagement, has already absented himself for a considerable time from his duties under the contract of hiring. The defendant is liable².

In the foregoing examples the defendant had notice of the existence of the relation of master and servant when he procured the servant to leave his master. Now, notice of the existence of this relation is necessary in all cases of actual service; in the absence of notice, the party enticing away or seducing the servant violates no duty to the master. But it matters not that such party had no notice at first of the existence of the relation, if he afterwards acquire notice and then persist in keeping the servant away from his master. For example: The defendant employs the plaintiff's servant, upon application by the latter; the servant having left the plaintiff during the existence of his contract of service, of

¹ Walker v. Cronin, 107 Mass. 555.

The allegation of malice, and with unlawful purpose to injure the plaintiff in his business, has been omitted from the foregoing statement as surplusage, the malice and the unlawful purpose being found in doing the act with notice of the relation. See ante, p. 113. 'It must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant,' etc. Crompton, J., in Lumley v. Gye, 2 El. & B. 216; Allen v. Flood, 1898, A. C. 1, 154. But see Glamorgan Coal Co. v. South Wales Miners' Federation, 1903, 1 K. B. 118, 131.

² Compare Lumley v. Gye, 2 El. & B. 216.

which, however, the defendant is ignorant. Afterwards the plaintiff informs the defendant that the person employed by him is his (the plaintiff's) servant. The plaintiff requests the servant to return to him, and the servant refuses; and the defendant then continues to keep him in his employ. The defendant is liable for so continuing to keep the servant, though not for taking him into his service¹.

In order, however, to maintain an action for preventing a renewal of the service (that is, for what is called 'harbouring' a

Harbouring. servant), and not for interrupting it, it is necessary that there should be a binding contract of service.

If there be no such engagement, the defendant cannot be liable to the plaintiff for persuading the servant to stay where he is rather than to return to the plaintiff, since the plaintiff neither has any right to require the service in such a case, nor is he at the time in the enjoyment of it as a gratuity. For example: The defendant receives, without notice, a person who has been acting in the service of the plaintiff under a contract void by the Statute of Frauds, and afterwards, on notice of the plaintiff's claim to the service, during the term of service agreed upon, refuses to send the person away. This is no breach of duty to the plaintiff².

§ 2. GRATUITOUS SERVICE

It was formerly a matter of some doubt if an action could be maintained for interrupting, with notice, the gratuitous relation of master and servant. It was sometimes supposed that inasmuch as the master in such a case could not require the services, he had no right to them which could be infringed. But this view does not now obtain. Though a person may not be able to require the bestowment of a gratuity, he has a right to it when it is bestowed, and in the course of receiving it, and no one may interrupt his actual enjoyment of the gratuity³. Hence if a

Binding engagement not necessary.

¹ *Blake v. Lanyon*, 6 T. R. 221.

² *Sykes v. Dixon*, 9 Ad. & E. 693. See also *Hartley v. Cummings*, 5 C. B. 247; *Pilkington v. Scott*, 15 M. & W. 657. Compare *infra*, pp. 121, 122.

³ See *ante*, pp. 5, 6.

person be actually engaged in giving his services to another, any one who, with notice, voluntarily interrupts the service violates a legal duty to the one receiving the gratuity, and becomes liable in damages. For example: The defendant, with notice, entices away a young woman while she is in the gratuitous service of the plaintiff, and thereby deprives the plaintiff of the benefit of her help. The plaintiff is entitled to recover damages therefor¹.

Indeed, it matters not in such cases that the person enticed was actually under obligation to another; if the latter do not insist upon his rights, no third person can set up those rights to escape liability for a wrongful act. For example: The defendant, with notice, seduces a married woman while she is rendering gratuitous service to the plaintiff, her father. The defendant is liable, and cannot set up in defence the paramount right of the woman's husband to her help².

As was observed, however, in the preceding section, and as follows from what has been said in the present, no action can be maintained for mere harbouring a servant serving gratuitously, though with notice: the action lies solely for enticing the person away or otherwise interrupting the performance of the service while the servant is disposed to, and engaged in, the performance of it. When such servant has put an end to the relation, the rights of the master at once terminate.

§ 3. CONTRACT IN GENERAL

After great discussion it was held in England in 1853 that the master's right in cases like those in section 1 is only an example and not an anomalous or a special case; a majority of the Queen's Bench laying down the rule as new only in the sense that it was then clearly and definitely stated, that to procure a man to break his contract, with notice of the existence of the same, is actionable if the plaintiff, the other party to the contract, suffered

**Master's
right deemed
only an ex-
ample: larger
view.**

¹ *Evans v. Walton*, L. R. 2 C. P. 615. The young woman in this case was the plaintiff's daughter, but she was of age.

² *Harper v. Luffkin*, 7 B. & C. 387.

harm¹. For example: The plaintiff's declaration alleged that the plaintiff, being proprietor of a theatre in London, made a contract with an opera singer, a certain Miss Wagner, whereby she agreed to sing exclusively at the plaintiff's theatre during a certain season; and that the defendant, proprietor of a rival theatre there, knowing the premises, persuaded and induced Miss Wagner to break her contract with the plaintiff, and to refuse to sing at his theatre, to the damage of the plaintiff. The defendant is liable².

In the example the court refused to consider whether the party induced to break the contract had already begun performance or not. And the whole decision (which, **Performance not begun.** on the question of *means*, will be considered later) has been reaffirmed in England³, and it has been followed or approved⁴, but also denied, in America⁵. And it has even been intimated in England that the subject is not altogether closed⁶; but the decision of the House of Lords in the year 1901⁷ has removed all doubt, in cases in which wrongful means were used. Indeed the law has been summed up in substance as follows: Every person has a right under the law to full freedom in disposing of his own labour or his own capital or property, as he

¹ *Lumley v. Gye*, 2 El. & B. 216. There was an allegation of malice in this case too; but that is considered to have been immaterial. *Allen v. Flood*, 1898, A. C. 1, 96, 121, 154, 169; and the quotation ante, p. 115, note 1, from *Crompton, J.*

² *Lumley v. Gye*, supra, Coleridge, J., dissenting in a long and powerful opinion, holding that the action for procuring breach of contract of service was founded upon the Statute of Labourers, and confined therefore to cases of the relation of master and servant in the ordinary sense.

³ *Quinn v. Leatham*, 1901, A. C. 450, 510, 535; *Allen v. Flood*, A. C. 1898, 1, 97, 106, 107, 113, 171 (some of their lordships reserving their opinions); *Bowen v. Hall*, 6 Q. B. Div. 333, Lord Coleridge, C. J., dissenting.

⁴ *Walker v. Cronin*, 107 Mass. 555; *Angle v. Chicago, St Paul & C. Ry.*, 151 U. S. 1, 13, 14. See *Rice v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11.

⁵ *Boyson v. Thorn*, 98 Calif. 578; *Rice v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11. The last case is the converse of the cases of the master's right, being a suit by a servant for procuring the master to break his contract with her and discharge her. A majority of the court held that there was no such converse right of action, unless wrongful means were used.

⁶ See *Allen v. Flood*, at pp. 123, 153, 168. But see infra, p. 121.

⁷ *Quinn v. Leatham*, supra. See also *Read v. Friendly Society of Stonemasons*, 1892, 2 K. B. 730, C. A., holding that want of improper motives for causing the breach of contract is no justification.

will; and it follows that every other person owes a correlative duty to permit the fullest exercise of his right consistent with the exercise of similar rights by others¹.

Several objections have been raised besides the one that there was no action for procuring breach of contract except by a master, before the Statute of Labourers of the middle of the fourteenth century. One of these objections is that the defendant's act is too remote for accountability—that the defendant cannot be liable for the free, voluntary misconduct of another not acting as his agent or servant. 'The action is not maintainable, as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant².' In other words, the *damnum* was not the natural or legal consequence of the *injuria*.

To this objection the answer appears to be, that even if Miss Wagner's act was not likely to result from the defendant's persuasion, the defendant at all events intended that it *should* result, and it did³. *A* may be liable for successfully persuading *B* to commit a crime or a tort, however improbable it may be that *B* will yield to the persuasion⁴. Intention to have an act done, and procuring it to be done though by persuading another to do it, should bring a man near enough to the act to make him accountable for it; successful endeavour ought to be enough. The fact that the immediate actor is a free agent, under no obligation to be persuaded, should not affect the case. It is settled law that the fact that intervening instruments are human beings, acting of their own will, does not necessarily cut off liability from one back of them⁵. But more directly to the

¹ *Quinn v. Leatham*, at p. 526, Lord Brampton, and *Read v. Friendly Society of Stonemasons*, 1902, 2 K. B. 88, 96, Darling, J.; both quoting Erle on Trade Unions, p. 12.

² *Wightman, J.*, putting the defendant's contention in *Lumley v. Gye*, ut supra.

³ *Bowen v. Hall*, 6 Q. B. Div. 333, 338, Brett, L. J.; *Quinn v. Leatham*, at p. 535.

⁴ 'He who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.' Erle, J., in *Lumley v. Gye*, supra.

⁵ *Thomas v. Winchester*, 6 New York, 397. See ante, pp. 42, 44, 45; post, in chapter on Negligence.

point, a husband can maintain an action against one who induces his wife, without legal cause, to leave him¹, and conversely a wife can maintain an action against one who similarly persuades her husband to abandon her²; and yet the leaving or abandonment is the 'spontaneous' act of the wife or husband, in the same sense in which Miss Wagner's act was spontaneous.

The other objection is, that the only duty bearing upon the case is the duty created by the contract. It makes no difference,

Objection : according to this objection, that the defendant was
duty one of near enough to cause and did cause the breach of
contract only. contract, since he violated no duty to the plaintiff; only the party who broke the contract violated such a duty. This objection is more serious. It does not go the length of denying that the defendant owed *any* duty to the plaintiff. It does not deny, and no one would deny, that the defendant owes to the plaintiff in such a case the duty to use no *wrongful means* to procure the breach³; it only denies that inducing one, by persuasion merely, to break one's contract is wrongful.

If this be not presumptively wrongful by clear doctrine of the common law, there will still be the appeal to public policy; and on that point the leaning of opinion appears to be in favour of treating persuasion to break a contract as too dangerous to the public welfare to be permitted. The well-established case of the right of action of a husband or wife against a third person for persuading the other party to the marriage contract to break the same by abandoning the other, if a stronger case, is still not without its force as a precedent. And the same may be said of the case of persuading another to commit a crime or a tort, for the person persuaded may have owed a duty of contract, as of faithfulness in a foreign agency, of which the offence is a breach purposely caused by the defendant. But what difference can it make whether the duty violated by the person persuaded is one of contract or of another kind? Why should there not be a legal duty not to persuade a man to break his contract as well as not to persuade a man to violate his duty to the state or any other duty paramount? Has the supposed dis-

¹ Winsmore v. Greenbank, Willes, 577; Lumley v. Gye, per Wightman, J.

² See the chapter on Seduction, post.

³ Note that the objection in no way questions the idea that the creation of a right in personam may incidentally or necessarily generate a right in rem.

inction anything more to rest upon than the confused notion that a right in personam is inconsistent with a right in rem¹?

One question, already referred to, remains, in the sense that it has not been carried to the House of Lords for decision on

Breach of contract procured by means not in themselves wrongful.	specific facts, namely, whether liability is incurred when the breach of contract, intentionally caused, has been caused by means not in themselves of a wrongful nature: as where the breach has been procured by argument or persuasion
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without misrepresentation or other wrongful act or conduct. Notwithstanding the decisions in the Queen's Bench and Court of Appeal², the distinction between such cases and cases of the use of wrongful means has been treated by judges in the House of Lords as an open one³. In the case decided by the House in 1901⁴ wrongful means had been used, and the decision appears to have been put upon that ground; though at the same time individual judges considered the decision of the Queen's Bench (and therefore the later ones of the Court of Appeal) correct⁵, and that is now declared to be the final result of the whole discussion⁶.

Assuming a *prima facie* cause of action, a justification must be something more than that the defendant 'acted bona fide in the best interest of' himself or of the company to which he belongs. It is not enough that he was not actuated by improper motives; he must have acted upon some legal right⁷.

¹ That there is no such inconsistency in reality is shown by the fact that to procure breach of contract by means admitted to be of a wrongful nature, such as misrepresentation, is unlawful (if actual damage result). It is everywhere agreed that a right in personam may generate a right in rem. See ante, p. 7.

² Ante, pp. 117, 118.

³ *Allen v. Flood*, at pp. 123 (Lord Herschell), 153 (Lord Macnaghten), 168 (Lord Shand).

⁴ *Quinn v. Leatham*, 1901, A. C. 450.

⁵ At pp. 510 (Lord Macnaghten, who before had reserved his opinion), 535 (Lord Lindley). See *Glamorgan Coal Co. v. South Wales Mining Federation*, 1903, 1 K. B. 118.

⁶ *Lumley v. Gye*, 2 El. & B. 216, ... as well as *Temperton v. Russell*, 1893, 1 Q. B. 715, has been finally established in *Quinn v. Leatham*, 1901, A. C. 495, to be a binding authority.' Collins, M. R., in *Read v. Friendly Society of Stonemasons*, 1902, 2 K. B. 730, 738.

⁷ *Read v. Friendly Society of Stonemasons*, supra; *Quinn v. Leatham*, supra. As to advice given on request, see *Glamorgan Coal Co. v. South Wales Mining Federation*, supra.

Assuming that the right in question exists, will it affect the case that the contract was not enforceable, as for instance because of the Statute of Frauds¹? Has the **Statute of Frauds.** plaintiff still a legal right towards the defendant? In cases in which wrongful means have been employed, as where the procuring was by misrepresentation², or by seduction, or by enticing away servants³, the courts have held that it makes no difference that the contract was not binding. Such cases have been put upon the ground that the plaintiff has a right to any service which another is willing to give, whether for pay or gratuitously; which accords with what we have already seen touching the nature of legal right⁴.

§ 4. DAMAGE

It is not enough that there has been a breach of contract, though that would of course be enough for an action against the party who had broken the same. For the **Engagement for fixed period.** purpose of an action against a stranger to the contract for procuring the breach, actual damage must be proved. It is not necessary however that there should have been an engagement for a fixed period of time, such as 'for the season'; the action lies as well where no time is fixed, or where the engagement is from day to day, or by the piece⁵. Indeed it has lately been held that specific damage need not be shown in cases in which it appears that some damage, however undefined, must have been sustained⁶; which indeed is in perfect accord with the legal idea of special damage⁷.

¹ Compare ante, p. 116, as to harbouring.

² Benton v. Pratt, 2 Wendell (New York), 385; Rice v. Manley, 66 N. Y. 82.

³ Evans v. Walton, L. R. 2 C. P. 15 (distinguishing Cox v. Muncey, 6 C. B. N. S. 375, and Sykes v. Dixon, 9 Ad. & E. 693, ante, p. 116); Harper v. Luffkin, 7 Barn. & C. 387; Fitzh. N. B. 91 G, note by Lord Holt; Bigelow's L. C. Torts, 292-304.

⁴ Ante, pp. 5, 6.

⁵ Gunter v. Astor, 4 J. B. Moore, 12; Hart v. Aldridge, 1 Cowp. 55; Lumley v. Gye, 2 El. & B. 216; Walker v. Cronin, 107 Mass. 555.

⁶ Exchange Telegraph Co. v. Gregory, 1896, 1 Q. B. 147, C. A.

⁷ Ratcliffe v. Evans, 1892, 2 Q. B. 524, 528, Bowen, L. J.

CHAPTER VI

SEDUCTION

Statement of the duty. *A* owes to *B* the duty not to seduce *B*'s female child and servant¹, capable of service, or *B*'s female ward and servant, capable of service, towards whom *B* stands in loco parentis, or to entice away or alienate the affections of *B*'s wife or husband.

The term 'seduction,' in its broad legal sense, includes the enticing away of servants and enticing away or alienating the affections of a husband or a wife; hence the use of the single word to cover all that is contained in the 'Statement of the duty.' The subject of enticing servants away has been disposed of in the next preceding chapter; what is left for the present chapter is seduction in the more common sense, including alienation of affection in the marital relation.

§ 1. ENTICING AWAY CHILDREN

It is doubtful whether any action lies by a parent for the mere enticing away of his minor daughter (or son), or for harbouring the child after notice that the departure is without the parent's consent². There must perhaps be either a loss of real service, or a loss of

Parent's right
of action: loss
of service.

¹ This was trespass formerly. See Chitty, Pleading, ii. 643, note.

² *Taylor v. Neri*, 1 Esp. 386 (referred to by Crompton, J., in *Lumley v. Gye*, 2 El. & B. 216), where Eyre, C. J., said that if a daughter left her father's service no action for loss of service could be maintained.

service by way of seduction; in the first case the ordinary relation of master and servant, already disposed of, exists between the parent and child; the second case is the subject now reached for consideration.

§ 2. SEDUCTION STRICTO SENSU: PARENT AND CHILD:
WHAT MUST BE PROVED, ETC.

A parent's right of action against one who has seduced or enticed away his child is at common law the right of action of a master; that is, it turns upon the existence of the relation of master and servant, not merely upon parental authority or kinship¹. The plaintiff need not prove notice of the relation of master and servant between himself and the child², but must prove the performance of some service, however slight, by the child accordingly, and the seduction. The right of action lasts as long as that relation lasts; it does not terminate necessarily when the child becomes of age³.

The relation of master and servant may however be severed (for the present purpose) by the child alone; accordingly the parent's right of action terminates whenever the child leaves the parent's house with intention not to return⁴, as well as while, with the parent's consent, she is out in the service of another.

Master and servant as ground of the right.

Absence of child from parent: will of child.

¹ Dean *v.* Peel, 5 East, 45.

² Chitty, Pleading, ii. 642, note. The defendant may be bound to know whether she was of age or not. If not of age, she would presumptively be in the father's service, it seems. Seduction of a young child should be a presumptive wrong to the father.

³ *Infra*, p. 126.

⁴ Dean *v.* Peel, 5 East, 45. See Griffiths *v.* Teetgen, 15 C. B. 344; Manley *v.* Field, 7 C. B. n. s. 96; Hedges *v.* Tagg, L. R. 7 Ex. 283.

In America the *father's* right of action is considered to depend, not upon the will of the child, but upon the will of the parent; and hence, notwithstanding the absence of the child from her father's house at the time of the seduction, the father has a right of action if he has not divested himself of his right to require her services, even though she were at the time of the wrong in the service of another with her father's permission. This, however, is the extent of the American rule. If the power of the parent over his daughter is gone at the time of the seduction, whether by his own consent in emancipating her or

It is considered however that, if the parent's control over his child was divested by fraud, he may treat it, on discovering the fraud, as never having been abandoned, and maintain an action against the seducer. For example: The defendant hires the plaintiff's daughter from his service with intent to seduce her, and by this means obtains possession of her person, and seduces her. The plaintiff is entitled to recover as if the daughter had been seduced while in his own service¹.

Where parent and child are living together at the time of the seduction, that fact appears to raise a presumptive right of action²; where the child is away for a time, if not in the service of another, an intention on her part to return is presumptively sufficient, for that shows that she has not severed the relation³.

There must have been ability to render service at the time of the seduction⁴; though whether actual services were being rendered or not, or what the extent or value of the services, has nothing to do with the right of action⁵, and in many cases may have little if anything to do with the amount recoverable. Loss of service is indeed of the gist of the action, by the common law; but when ability to perform service has been shown, damages may be given not merely for any actual loss of service but also for the disgrace inflicted upon the plaintiff and his family⁶, the amount which may be given varying more or less with the station in life of the parties and being subject to the reasonable judgment of the jury⁷.

binding her out to service, or by the act of the law in taking her away from him, the seducer has violated no legal duty to him; though there has been some doubt as to the application of this doctrine in the case of the return of the daughter to the parent after the seduction.

¹ Speight v. Oliviera, 2 Stark. 493; Dain v. Wycoff, 7 New York, 191, 194.

² Thompson v. Ross, 5 H. & N. 16; Terry v. Hutchinson, L. R. 3 Q. B. 599, 602.

³ Terry v. Hutchinson, *supra*.

⁴ Hall v. Hollander, 4 B. & C. 660.

⁵ See Grinnell v. Wells, 7 Man. & G. 1044, note to the case.

⁶ Terry v. Hutchinson, L. R. 3 Q. B. 599; Bartley v. Richtmyer, 4 Comst. (New York), 38; Bigelow's L. C. Torts, 294.

⁷ The only limit upon their action as to the amount, as in many other cases, is that it must not be excessive, under all the facts of the case taken together.

The father's right of action continues, as has already been intimated, after the daughter has come of age, if the relation of master and servant is still in existence between them. If the parent continue to exercise authority over the daughter after her majority, and she continue to submit, she is still his servant, though not under an actual engagement to serve him; and seduction under such circumstances is a breach of legal duty to the parent. For example: The defendant seduces the plaintiff's daughter, aged twenty-two years. Prior to and at the time of the seduction the daughter has been living part of the time with her brother, who resides about a mile from her father's house, and part of the time with her father. She has not received wages from her brother, and when at home has worked for her mother, the plaintiff buying her clothing. The daughter is the plaintiff's servant, and the defendant is liable¹.

It has been held that the seduction should be followed by pregnancy or disease to entitle the plaintiff to recover²; but there is some doubt on the point³. The American rule is, that where the proper effect of the connection is an incapacity to labour, by reason of which the plaintiff loses the services of his daughter and servant, the loss of such services entitles the plaintiff to recover against the seducer. The same principle which gives a master an action where the connection causes pregnancy applies to the case of sexual disease, and, indeed, to all cases where the proper consequence of the act of the defendant is a loss of health resulting in an incapacity for such service as could have been rendered before. For example: The defendant seduces the plaintiff's minor daughter, by reason of which, without becoming pregnant (or being affected with sexual disease), she suffers general injury in health, so that it becomes necessary for the plaintiff to send her away for her recovery; whereby he incurs expense and loses his daughter's services. The defendant is liable⁴.

¹ *Sutton v. Huffman*, 3 Vroom (New Jersey), 58; *Rist v. Faux*, 4 Best & S. 409 (Ex. Ch.); *Evans v. Walton*, L. R. 2 C. P. 615. See ante, p. 124.

² *Eager v. Grimwood*, 1 Ex. 61. But see *Evans v. Walton*, L. R. 2 C. P. 615, 617.

³ *Evans v. Walton*, L. R. 2 C. P. 615, 617; *Abrahams v. Kidney*, 104 Mass. 222.

⁴ *Abrahams v. Kidney*, 104 Mass. 222; *Boyle v. Brandon*, 13 M. & W. 738.

If however the loss of health be caused by mental suffering not the necessary effect of the seduction, especially if produced by subsequent causes, the loss of service is not the effect, in contemplation of law, of the defendant's act; and hence the action cannot be maintained. For example: The defendant seduces the plaintiff's minor daughter, and subsequently abandons her, in consequence of which she suffers such distress of mind as to bring illness upon her, and incapacitate her for performing services for the plaintiff; no pregnancy or disease resulting by direct consequence of the seduction. The defendant is not liable to the plaintiff¹.

**Loss of health
due to mental
suffering.**

If a loss of service follow as the proper effect of the defendant's act, it is held in America to be immaterial, so far, that the defendant accomplished his purpose without resorting to seductive arts. The willingness of the daughter cannot affect the parent's right of action for loss of service²; though the ready consent of the young woman might be ground for mitigation of other damages³, especially if she was notoriously a loose character.

**Seductive arts
not necessary.**

What has been said in the preceding paragraphs concerning the parent's right of action for loss of service must be understood of the father's claim to damages. During his guardianship of the daughter, the right of action belongs to him alone. Should he be removed by the law from his natural position of authority, or should he die during the child's minority, the question arises of the mother's right of action against the seducer. It is clear if the guardianship of the child has been given to her, she has a right of action for the loss of service; though it may be doubted if at the present time the mere relation of guardian, apart from that of parent, would, in all cases, afford a right of action for the child's seduction, a point to be further adverted to in the next section.

**Claim of
mother.**

¹ Boyle v. Brandon, *supra*; Abrahams v. Kidney, *supra*. See ante, pp. 26, 27.

² Damon v. Moore, 5 Lansing (New York), 454.

³ Hogan v. Cregan, 6 Robertson (New York), 138, criticised in Damon v. Moore, *supra*. Compare Winter v. Henn, 4 Car. & P. 494, and Forster v. Forster, 33 L. J. Prob. & M. 150, n., as to criminal conversation.

A difficulty arises where the mother, upon the death of the father, or his removal from the guardianship, simply continues to exercise authority over her daughter, and to receive her (voluntary) obedience, without having received an appointment as guardian. The mother's right of action has sometimes been supposed to turn upon the question of her right to require the child's support in such a case. It is now well settled in America however that so long as the daughter continues to give obedience and service to her mother, the latter has a right of action for a wrongful interruption of the daughter's position of servant. For example: The defendant seduces the minor daughter of the plaintiff, a widow. The daughter, having previously been in the service of the defendant, and then in the service of *D*, returns from the latter person to her mother to aid her during sickness in the family. While thus with her mother for a day or two, she is got with child by the defendant. The defendant has violated a legal duty to the plaintiff and is liable in damages¹.

The authority from which this example has been given went one step further, and decided that the mother's right of action was not affected by the fact that the daughter, when seduced, was actually in the service of another, so long as she indicated a willingness to consider her mother as still entitled to her assistance².

The child is not entitled, apart from statute, to sue for her own seduction, since she has consented to the act; though
Action by if the seduction was effected under a promise of
child seduced. marriage, which is afterwards broken, she may recover damages for the seduction. But the action is then for the breach of promise of marriage, and not for the seduction. For like reason the parent is barred if he consented or virtually

¹ *Gray v. Durland*, 51 New York, 424. In *Abrahams v. Kidney*, 104 Mass. 222, the mother sued and recovered.

² It is obvious that the rules of law as to cases like those stated must remain in uncertainty and conflict until the nature of the mother's authority is definitely settled. It is still more doubtful whether the mother of a daughter not born in lawful wedlock could maintain an action in a case like that of the text. The mother would not be even guardian for nurture in such a case. See *Regina v. Clarke*, 7 El. & B. 186; *In re Ullee*, 53 L. T. N. S. 711, affirmed 54 L. T. N. S. 286, Ch. Div. But statutes concerning the mother's rights are coming into existence in America.

consented to the act. For example: The defendant is permitted by the plaintiff to visit his daughter as a suitor, after notice that he is a married man and a libertine; the defendant, on inquiry by the plaintiff as to this matter, representing that his wife is an abandoned character, and that he will soon obtain a divorce from her, and then marry the plaintiff's daughter. The defendant afterwards, while continuing his visits at the plaintiff's house, seduces the young woman. The plaintiff is deemed not entitled to recover for the seduction¹.

§ 3. GUARDIAN AND WARD: WHAT MUST BE PROVED, ETC.

Not only the parent, but any one standing as guardian, in loco parentis, and receiving, to his own benefit, the services of a child, can maintain an action for loss of service on proof that the defendant has interrupted the same and deprived the plaintiff of the benefit of the service, however slight. For example: The defendant seduces the plaintiff's niece, the parents of the young woman being dead, and the plaintiff standing towards her in loco parentis. The defendant is liable, though the young woman has property left her by her parents, and performs but slight service for the plaintiff².

The right of action in all such cases, and in cases strictly of guardian and ward, depends, it seems, upon the fact that the guardian or person standing in loco parentis is receiving the services (however slight) to his own benefit. If the guardian has merely the supervision of the ward and her income, while she lives elsewhere, or performs service for herself, the guardian simply receiving her wages and acting as her trustee, it is improbable that he can sue for her seduction³.

¹ *Reddie v. Scoolt*, Peake, 240. Compare cases of criminal conversation, post, pp. 134, 135.

² *Manvell v. Thomson*, 2 Car. & P. 303. And, as in the case of an action by the father, damages may be given beyond the value of the services. *Irwin v. Dearman*, 11 East, 23. It is not necessary, it seems, to prove knowledge of the guardianship. Compare *Chitty*, Pleading, ii. 642, note.

³ In early times the ward was the guardian's chattel. *Lumley v. Gye*, 2 El. & B. 216, 250, 257.

On the whole, the chief difference between the ordinary case of master and servant on the one hand, and that of parent and child and guardian and ward on the other, appears to be that in the former case the services must be substantial, and the damages would (probably) be confined to actual loss suffered; whilst in the other two cases the services may be nominal, such as might be presumed where persons so related live together¹.

§ 4. HUSBAND AND WIFE: WHAT MUST BE PROVED, ETC.

To entice away, or alienate the affections of, one's wife, though without knowledge of the existence of the marital relation², is a civil wrong for which the offender is liable to the injured husband³. The statement indicates what is to be proved. The gist of the action however is not the loss of assistance, but the loss of the consortium of the wife⁴, which term implies an exclusive right, against an invader, to her affection, companionship, and aid⁵. It is indeed held in America to be unnecessary that there should be any separation or pecuniary injury; in which respect the action resembles that of a parent for the seduction of his daughter. For example: The defendant, by false insinuations against the plaintiff, and other insidious wiles, so prejudices and poisons the mind of the plaintiff's wife against him, and so alienates her affections from him, as to induce her to desire and seek to obtain, without just cause, a divorce; and by his false insinuations and wiles succeeds in persuading the wife to refuse to recognize the plaintiff as her husband. The defendant is liable, though no actual absence of the wife is caused⁶.

¹ For this paragraph the author is indebted to his learned friend, Mr R. T. Wright, of the University of Cambridge.

² Chitty, Pleading, ii. 642, note.

³ In America, under changes partly silent, partly effected by recent statutes, the wife, in the converse case, now has a corresponding right of action. *Westlake v. Westlake*, 34 Ohio St. 621; *Bennett v. Bennett*, 116 N. Y. 584; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Foot v. Card*, 57 Conn. 247. See however *Lynch v. Knight*, 9 H. L. Cas. 577.

⁴ The old form of allegation in a case of master and servant was 'per quod servitium amisit'; in a case of husband and wife, 'per quod consortium amisit.'

⁵ See Black. Com. iii. 139, 140; *Bigaonette v. Paulet*, 134 Mass. 123.

⁶ *Heernance v. James*, 47 Barbour (New York), 120.

This example, it will be observed, does not go to the extent of declaring a person liable for enticing away or corrupting the affections of the wife by reason of charges against the husband which are *true*; but there can be little doubt that such an act would be a breach of duty to the husband¹. The constancy and affection of a wife are all the more valuable to him if his conduct is bad.

A difference is deemed to exist however between the act of a parent and that of other persons with regard to persuading a wife to leave her husband. In the case of one **Persuasion by parent.** not a parent, it is certainly not necessary that bad motives should have inspired the act². It does not follow however that mere advice to a married woman by a stranger to leave her husband, upon representations by the wife, would be unlawful; advice in such a case is one thing, enticement is another.

But it has also been stated in America that it is no breach of duty to the husband for a parent, upon information that his daughter is treated with cruelty by her husband or is subjected to other gross indignities such as would justify a separation, to go so far as to persuade her to depart from her husband; though it subsequently appear that the parent's persuasion was based on wrong information³. It is held that bad motives must have actuated the parent in order to make him liable⁴. This seems to mean that the parent must either have enticed his daughter to leave or to stay away out of ill-will towards her husband, and not by reason of any good ground for their separation; or that he must have some end to gain of personal benefit to himself. In the absence of facts of this character, the parent is deemed not liable for persuading his daughter to absent herself from her husband on information justifying (if true) a divorce or even a departure of her own motion; though a stranger in blood would be liable.

¹ See *Bromley v. Wallace*, 4 Esp. 237. The conduct of the husband could be shown only in mitigation of damages. *Id.*

² See *Hutcheson v. Peck*, 5 Johnson (New York), 196; *Bennett v. Smith*, 21 Barbour (New York), 439.

³ *Bennett v. Smith*, 21 Barbour (New York), 439, 443.

⁴ *Hutcheson v. Peck*, *supra*.

Any person who receives into his house a married woman, who has abandoned her husband, or suffers her to stay there, after receiving notice from the husband not to **Harbouring.** harbour her, is deemed, presumptively, to violate a duty which he owes to the husband¹. But any one may, notwithstanding such notice, shelter the wife out of humanity, on reasonable representations by her that she has left her husband because of cruel treatment by him. For example: The defendant receives the plaintiff's wife into his house, upon representations of ill treatment by her husband; and he continues to permit her to remain there after notice from the plaintiff not to do so. The defendant is not guilty of a breach of duty to the plaintiff².

Liability for harbouring must (probably) be limited to cases in which the defendant has clear notice that the wife's act in coming to him, or in staying with him, is intended as a separation by her from her husband, and a repudiation of his claims as such. A man cannot at the present day be liable in damages for allowing a married woman to remain in his house a few days after notice not to do so, if she deny that she has abandoned her husband and claim that she is merely visiting, or that she is away from home for some other temporary and reasonable purpose. The defendant's liability, when it exists, rests upon the ground that he is a party to the unlawful purpose of depriving the plaintiff of the benefit of some advantage embraced under the designation of the consortium of his wife³. If the wife were disposed to stay an unreasonable length of time after notice from the husband, that fact would perhaps be sufficient to cause him to suspect her true purpose, and to render him liable in case he continued to permit her to remain.

It is settled law in America that the mere fact of receiving another's wife is not unlawful, even though no explanation whatever be offered⁴. There must be an enticing or harbouring with reference to a wrongful separation. It is not enough even

¹ *Winsmore v. Greenbank*, Willes, 577; s. c. *Bigelow's L. C. Torts*, 328. See *Addison, Torts*, 905, 4th ed.

² *Philp v. Squire*, Peake, 82.

³ *Winsmore v. Greenbank*, Willes, 577; *Hutcheson v. Peck*, 5 Johnson (New York), 196.

⁴ *Barnes v. Allen*, 1 Keyes (New York), 390. See also *Winsmore v. Greenbank*, *supra*.

that the defendant take the plaintiff's wife to the defendant's house, upon request by her, unless he has notice that she is abandoning her husband; though he has been required by the plaintiff not to harbour her. For example: The defendant and the plaintiff are farmers and neighbours, residing about two miles apart. Their wives are relatives, and the plaintiff's wife often visits the defendant's; the defendant taking her to his house in his wagon. The plaintiff's wife on one occasion being so at the defendant's house, the plaintiff gives the defendant written notice not to harbour her, but to return her to his residence from which he (the defendant) has taken her. The defendant having stopped with the wife near her husband's house, she goes to enter it, but finds the door locked, and returns to the defendant, requesting him to take her to his house. The defendant shows her the notice, and advises her not to go, but she makes light of the matter, and is taken to the defendant's house. The next day the defendant carries her home; and the plaintiff brings suit for the harbouring. The action is not maintainable; the defendant not having attempted to influence the wife to leave her husband¹.

So much for enticing away a man's wife. The common law gave a right of action also for 'criminal conversation' with one's wife²; and upon the same ground as that for enticing the wife away from her husband, to wit, the loss of consortium³. It arose accordingly without regard to the infliction of pecuniary damage⁴. But the common law right of action was abolished by Act of Parliament in the year 1857, and the redress turned over to the Divorce Court⁵.

Criminal intercourse: consortium. The Act permits the husband on a petition for dissolution of the marriage, or for judicial separation, or on a petition limited to such object only, to claim damages from any one for committing adultery with his wife; and the claim is to be tried in the same way and subject to the same

¹ *Schuneman v. Palmer*, 4 Barbour (New York), 225.

² *Weedon v. Timbrell*, 5 T. R. 357; *Harvey v. Watson*, 7 Man. & G. 644; *Bigaouette v. Paulet*, 134 Mass. 123.

³ *Weedon v. Timbrell*, 5 T. R. 357.

⁴ *Wilton v. Webster*, 7 Car. & P. 198.

⁵ 20 & 21 Vict. c. 85, §§ 33, 59.

rules as actions for criminal conversation formerly¹. It is necessary then to consider the old law to understand the new.

Loss of consortium is then still the ground of action; and it follows that upon separation, by articles of agreement, the husband, having voluntarily parted with his wife's consortium, cannot maintain an action for criminal conversation with his wife². But if the separation was without any relinquishment by the husband of his right to the society of his wife, the action is maintainable. For example: The defendant, having entered into a contract for the support of the plaintiff's wife at his (the defendant's) house, the wife goes there under the agreement, and the defendant seduces her. The act is a breach of duty to the plaintiff, for which the defendant is liable³.

The mere fact of the husband's infidelity to his wife does not change the nature of the defendant's act in seducing and debauching her; though it may possibly, in contemplation of law, affect its enormity. For example: The defendant seduces and has criminal intercourse with the plaintiff's wife. Proof is offered by the defendant that the plaintiff had shown the greatest indifference and want of affection towards his wife; that while she lay dangerously ill at Y, the plaintiff (a surgeon in the navy), though his vessel was at Y, and he landed almost daily, was often at the door of the house where his wife lay sick, without visiting her, or showing any anxiety or concern for her: and at the same time that he had been guilty of adultery and had contracted a venereal disease. This is no defence to the action⁴; though it might be considered in mitigation of damages⁵.

If however the husband was accessory to his own dishonour, the case is different; he could not complain of an injury to which he had consented⁶. For example: The plaintiff allows his wife to live as

**Husband's
consent:
negligence.**

¹ § 33.

² *Harvey v. Watson*, 7 Man. & G. 644.

³ See *Chambers v. Caulfield*, 6 East, 244. *Weedon v. Timbrell* has been limited to this extent.

⁴ *Bromley v. Wallace*, 4 Esp. 237, overruling *Wyndham v. Wycombe*, id. 16.

⁵ Id.; *Rea v. Tucker*, 51 Illinois, 110.

⁶ 'Volenti non fit injuria.'

a prostitute, and the defendant then has intercourse with her. This is no breach of duty to the plaintiff¹.

Mere negligence in regard to the wife's behaviour; inattention or dulness of apprehension; or even permission of indecent familiarity in the husband's presence; such things are held insufficient to bar a recovery for criminal conversation with the wife, though they may be shown in reduction of damages. Unless the conduct of the husband amount to consent to the defendant's act of intercourse, the defendant is liable².

It follows from what has been said that condonation of the wife's offence does not excuse the man who seduced her; the sole consequence of the condonation is that the husband is barred from obtaining a divorce. For example: The defendant has criminal intercourse with the plaintiff's wife, and, when fatally sick, the wife discloses the fact to her husband. The plaintiff continues to care for his wife kindly until her death. The defendant is liable³.

¹ See *Cibber v. Sloper*, cited 4 T. R. 655; *Hodges v. Windham*, Peake, 39; *Sanborn v. Neilson*, 4 New Hampshire, 501.

² See *Foley v. Peterborough*, 4 Doug. 294; Greenleaf, Evidence, ii. § 51. But on the amount of damages in such cases see *Duberley v. Gunning*, 4 T. R. 651. And as to that case see *Jones v. Sparrow*, 5 T. R. 257; *Chambers v. Caulfield*, 6 East, 244; *Blunt v. Little*, 3 Mason, 102, 106; Bigelow's L. C. Torts, 338.

³ *Wilton v. Webster*, 7 Car. & P. 198; *Bernstein v. Bernstein*, 1892, 2 Q. B. 375; *Powers v. Powers*, 10 P. D. 174.

CHAPTER VII

SLANDER AND LIBEL

Statement of the duty. *A* owes to *B* the duty not to publish of *B* (1) defamation in its nature actionable per se, (2) defamation in its nature not actionable per se, to the damage of *B*.

Defamation is any language or representation, oral or written, tending to bring the person of whom it is published into hatred, ridicule, or disgrace, or to injure him in respect of his vocation.

The term 'representation' is here used to denote painting, picture, sign, or effigy.

Slander is oral defamation, or the equivalent (as by finger speech).

Libel is defamation by writing, printing, or representation.

Whenever language is spoken of as defamatory it is understood to be false.

What the phrase 'defamation in its nature actionable per se' means will be made known by the proposition of law following, and the consideration of its parts.

§ 1. DEFAMATION ACTIONABLE PER SE: WHAT MUST BE PROVED

The general proposition of law is, that the first of the two duties above stated is violated by *A*, and *B* can maintain an action against him, without proving special damage, on proof of publication by *A* of words, language, or the like of a false and

defamatory character concerning *B*, in any of the following ways, and in no other: (1) Where *A* imputes to *B* the commission of a criminal offence punishable by imprisonment, or other corporal penalty, in the first instance¹; (2) where *A* imputes to *B* the having a contagious or infectious disease of a disgraceful kind; (3) where *A* makes a derogatory imputation concerning *B* in respect of his office, business, or occupation; (4) where the defamation is a libel. So, within the limits suggested, every man has a legal right to a good name. Whether any one believed the defamatory charge is immaterial in regard to the right of action². Each of the foregoing classes of defamation must be examined³.

¹ Pollock, Torts, 238, 6th ed. It is not enough that the offence is punishable by 'fine in the first instance, with possible imprisonment in default of payment.' *Id.*, referring to *Webb v. Beavan*, 11 Q. B. D. 609. The offence charged need not be indictable. *Webb v. Beavan*.

² *Bishop v. Journal Newspaper Co.*, 168 Mass. 327.

³ There has been much criticism of the English and American law of defamation; but this has been directed mostly to what now is history. There have been three chief subjects of this criticism; malice, the limitation of actionable defamation, and the distinction between slander and libel. The criticism on the first head is now historical only; the trouble about malice was probably an inheritance from the early ecclesiastical jurisdiction, founded as that was on *malitia* as sin. Naturally when the King's Courts acquired jurisdiction over defamation (Stat. Westminster 2, c. 24) they took the notion of malice from the ecclesiastical conception—a wrong basis for civil law, from which the courts found their escape only in the 19th century. The Star Chamber may also have had a similar disturbing influence in the matter. On the second head criticism lingers against the present law; but in that particular it is somewhat misconceived. It is said, for instance, that the imputation of an indictable offence is actionable not because it is defamatory, 'but because it may tend to the deprivation of liberty.' *Law Quarterly Review*, July, 1902, p. 257, an interesting article on the English Law of Defamation, by Frank Carr, LL.D. This criticism, though pointed against the present law, is really like the other, historical; there was a time, in earlier English law, when to call a woman 'meretrix' in London was very apt to lead to serious legal consequences (at the cart's-tail) to the accused; but would any judge at the present day seriously intimate that to impute an indictable offence, of any kind, to a person would *tend*, in the legal sense, that is, would be apt, naturally and probably, to cause him to suffer under the law? That suggestion was in effect disposed of by Bayley, J., in *Lumby v. Allday*, 1 Cr. & J. 301, 305; s. c. 1 Tyrwh. 217; and by Lord Blackburn in *Capital and Counties Bank*, 7 App. Cas. 771, 772. The point is referred to post, pp. 143–145. The limitation in question amounts now, in the case of slander, to a clear definition of what otherwise (as in the Roman and modern foreign systems of law) would be vague and troublesome; for who would say what actionable defamation would be in the borderland? What constitutes scandal there? Libel shows the difficulty. A clear rule is better, especially

§ 2. INTERPRETATION OF LANGUAGE

Before proceeding to the consideration of any of these classes of breach of duty, it should be observed that, subject perhaps to one exception, the language or figure complained of is to be understood presumptively in its natural and usual sense, i.e. in the sense in which the persons who heard or read or saw it, as men of ordinary intelligence, would understand it¹. It is not to be construed in a milder sense ('mitiori sensu') merely because it is capable, by some forced construction, of being interpreted in an innocent sense. For example: The defendant publishes of the plaintiff the following words: 'You are guilty of the death of *D*.' This is an imputation of

where liability is put on the ground that damage need not be proved; such ground needs that sort of justification—a clear-cut definition. The third head of criticism, the distinction between slander and libel, has had good ground; but that too is gradually becoming historical. It is generally agreed that newspapers wield a dangerous power, and that the distinction, or at least that some wide distinction of the kind, should prevail, to keep the press in reasonable restraint. As for other cases in which the distinction is outgrown, these are becoming too infrequent before the courts to cause much concern. Men will not now-a-days sue for trifles—it is not worth while. See post, p. 149. The chief practical difficulty with libel is that it lacks a sharp definition (see post, p. 147); towards such the courts might well work. If libel were made coterminous with slander in all cases there would be great gain; the law would then be reasonably certain, and advice could be given with confidence where now there must be doubt. But newspaper libel should remain subject to the criminal law.

A reference to some other systems of law is added. Dig. 47, 10; Cod. 9, 36; Institutes, iv. 4. 1; French law of May 17, 1819, quoted in Law Quarterly Review, July, 1902, p. 256; Scotch law, Aitken v. Reat, 7 Murrell, p. 149, quoted in the same journal, p. 257. In those systems defamation, without defined limits, is actionable. See also Law Quarterly Review, vol. 10, p. 158, on 'the adaptation by the Star Chamber of the later Roman law of libellus famosus'; and id. October, 1902, p. 388, second part of Mr Carr's article.

¹ Hankinson v. Bilby, 16 M. & W. 442; Simmons v. Mitchell, 6 App. Cas. 156. Whether the words in *slander* are legally defamatory or not is a question for the judge, in jury trials, where the words have, or, if they are modified by the circumstances, where they then have, a fixed meaning. See Capital & Counties Bank v. Henty, 7 App. Cas. 741. But if, on the whole evidence, the meaning is doubtful, the question is for the jury. See Riddell v. Thayer, 127 Mass. 487 ('bad woman'). In criminal cases of libel the jury were made the judges whether the language was libellous or not by Fox's Act, 32 Geo. 3, c. 60. The same practice has been adopted in civil cases of libel also.

the commission of murder, and is not to be construed 'mitiori sensu'.

It should however be clear, in order to make language actionable without proof of damage, that the imputation was slanderous or libellous (according to its nature) within the meaning of some one of the above stated classes. If this be not the case, it will not be deemed a breach of the duty; and this too whether the question of interpretation come before the court or before the jury. In one case at least the interpretation adopted has been apparently contrary to the understanding of men of ordinary intelligence; and that is where an imputation is made of what would ordinarily be understood as a crime, but the language of which does not necessarily import a crime in the legal sense. An imputation of a criminal nature, which does not import a crime in the legal sense, is not actionable per se². For example: The defendant publishes of the plaintiff the following words: 'He has taken a false oath against me in Squire Jamison's court.' This is deemed not to be an imputation of the commission of perjury³; the term 'perjury' signifying the taking of a false oath knowingly, before a court of justice, with reference to a cause pending.

Apart from this particular exception in regard to the legal sense of a crime, it follows from what has been said that it is immaterial whether the defamatory charge be affirmative and direct, or indirect so as to be matter of inference merely, or that it is only insinuating⁴ or ironical, or that it is made in allegory or other artful disguise. It is enough that the charge would naturally be understood to be defamatory by men of average intelligence.

¹ Peake v. Oldham, 1 Cowp. 275.

² Ward v. Clark, 2 Johnson (New York), 10. 'The offence need not be specified...at all if the words impute felony generally. But if particulars are given, they must be legally consistent with the offence imputed.' Pollock, Torts, 239, 6th ed., referring to Jackson v. Adams, 2 Bing. N. C. 402. The reason for the strictness of the rule no doubt is, that the plaintiff seeks to recover without proof of actual damage.

³ Ward v. Clark, *supra*.

⁴ See Haynes v. Clinton Printing Co., 169 Mass. 512.

§ 3. PUBLICATION OF DEFAMATION AND SPECIAL DAMAGE

Defamation is published when the charge, suggestion, or representation is made, by the defendant, in presence of a third person, either by intention or by negligence¹. It **What publication means.** is not published when addressed only to the plaintiff, no one else being present² who could understand the language³. That is, the language or representation cannot in such a case be actionable as defamation. And this is true, though the alleged wrong be directly followed by great dejection of mind on the part of the plaintiff, and consequent sickness and inability to carry on his usual vocation, and expense attending upon his restoration to health or upon the employment of help to carry on his business. For example: The defendant says to the plaintiff, 'You have committed adultery with F.' The plaintiff, a farmer, suffers immediate distress of mind and body, becomes sick and unable to attend to his work, his crops suffer, and he is compelled to employ extra help to carry on necessary work. The defendant has not violated any legal duty to the plaintiff⁴.

Indeed, if the language complained of be not actionable per se (that is, if it be not actionable without the proof of special damage), the fact that the publication of the defamation occurred in the presence of a third person who, by authority, reported it to the plaintiff with such a result as that stated in

¹ *Viztetelly v. Mudie's Library*, 1900, 2 Q. B. 170.

² *Shefill v. Van Deusen*, 13 Gray (Mass.), 304. See *Marble v. Chapin*, 132 Mass. 225, 226. Communication of defamation by the defendant to his wife is held not to be publication. *Wennhak v. Morgan*, 20 Q. B. D. 635. But an accusation of the husband in the presence of his wife (or the converse) would be a publication. *Nolan v. Traber*, 49 Maryland, 460; *Hawver v. Hawver*, 78 Ill. 412; *Duval v. Davey*, 32 Ohio St. 604. See *Wenman v. Ash*, 13 C. B. 836, which suggests a doubt in regard to accusations of the wife made to the husband.

³ As to translations of language see *Wilson v. Noonan*, 27 Wisconsin, 598; *Mouson v. Lathrop*, 96 Wisconsin, 386, 389.

⁴ Compare *Terwilliger v. Wands*, 17 N. Y. 54, 63, and *Wilson v. Goit*, id. 442, which taken together, justify the example.

the foregoing example, would not, it is held, make the defamer liable¹.

This however proceeds upon the ground that the effect of distress of mind, followed by sickness, is not such damage as the law requires when the defamation is not actionable per se. The rule of law upon this subject is, that defamation not actionable per se may be a breach of duty if it be attended with special damage. But special damage (and damage of a general nature as well) must be the natural and usual result of the wrong complained of, as effect follows cause; and, as it is sometimes declared in effect, mental distress with its consequences will not satisfy this doctrine, effect upon the mind and then upon health being largely due to individual peculiarities, and not being certain or uniform². Or, better still, damage resulting from *fear* of injury to reputation, or from wounded feelings, is not damage to reputation; that can only be injured when it has been defamed before a third person.

The damage complained of must then in all cases, whether general or special, have been sustained through the action of a third person. Special damage may so result in several ways, so as to make the publication of defamation actionable when it would not be actionable per se; as by the loss of a marriage. For example: The defendant falsely charges the plaintiff, an unmarried female, with unchastity, in the presence and hearing of *C*, to whom the plaintiff is engaged to be married. *C*, in consequence of the charge, terminates the engagement. The defendant is liable to the plaintiff³.

Mental distress not damage.

Act of a third person necessary: examples.

¹ *Terwilliger v. Wands*, 17 New York, 54, 63, reaffirmed in *Wilson v. Goit*, id. 442, and overruling *Bradt v. Towsley*, 13 Wend. 253, and *Fuller v. Fenner*, 16 Barbour (New York), 333. But see *McQueen v. Fulgham*, 27 Texas, 463.

² Such damages are commonly spoken of as 'remote.' Compare *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222; *Spade v. Lynn R. Co.*, 168 Mass. 285; s. c. 172 Mass. 488. Some American cases are contra. See 168 Mass. 290. But the authorities are not quite consistent; mental distress being treated as ground for damages if a right of action is *otherwise* shown. See ante, p. 27; *Warren v. Boston & M. R.*, 163 Mass. 484, 487; *Spade v. Lynn R. Co.*, 172 Mass. 488, 490, *Holmes, J.* (see s. c. 168 Mass. 285); *Pugh v. London Ry. Co.*, 1896, 2 Q. B. 248; *Harvard Law Rev.*, December, 1896, p. 239.

³ See *Terwilliger v. Wands*, 17 New York, 54, 60.

The same would be true of the loss of the consortium of a wife¹ and no doubt of a husband². The same would also be true of the refusal to the plaintiff of civil entertainment at a public-house³. So of the fact that the plaintiff has been turned away from the house of her uncle, and charged not to return until she shall have cleared up her character⁴; and so in general of the loss by the plaintiff even of gratuitous hospitable entertainment⁵. All this would be special damage.

The special feature of the law of slander and libel however consists in this, that defamation may be actionable per se; and the consideration of the various phases of such defamation will now follow. Let it be clearly observed, that in defamation arising under any of the heads now to be separately examined, the plaintiff establishes the breach of duty, and consequently his right to recover, by simply proving publication⁶ (together with any explanation that may be necessary). In cases of defamatory publications not falling under the following heads, the plaintiff must also prove damage; that is the only difference between the two classes of cases.

**Defamation
actionable
per se.**

§ 4. IMPUTATION OF HAVING COMMITTED A CRIME

An imputation of the commission of a criminal offence is actionable per se whether the offence imputed is a felony or a misdemeanor, if it is punishable in the first instance by punishment⁷. If the offence imputed is only a misdemeanor, it must also, it seems, import scandal.

¹ *Bigaouette v. Paulet*, 134 Mass. 123.

² See *Lynch v. Knight*, 9 H. L. Cas. 577.

³ *Olmstead v. Miller*, 1 Wendell (New York), 506. See *Moore v. Meagher*, 1 Taunt. 39.

⁴ *Williams v. Hill*, 19 Wendell (New York), 305.

⁵ *Id.*; *Moore v. Meagher*, 1 Taunt. 39; ante, p. 5.

⁶ *Webb v. Beavan*, 11 Q. B. D. 609. On the question who are publishers see *Youmons v. Smith*, 153 New York, 214 (liability of a printer).

⁷ Statute has recently corrected the common law, by giving a right of action to 'any woman or girl' falsely accused of unchastity or adultery, without the need of proving special damage, as in other cases under this head, 54 & 55 Vict.

The authorities are not in harmony in regard to the question whether it is necessary that the charge, if true, would subject the accused to the danger of punishment, or whether the test in this particular (assuming that the imputation is otherwise actionable per se) is the degradation involved; but the weight of authority favours the latter as the test. Although, then, the charge imputes that the punishment has already been suffered, and hence cannot expose the plaintiff to the danger of punishment, the degradation involved in the (false) accusation renders the defendant liable. For example: The defendant says of the plaintiff, 'Robert Carpenter [the plaintiff] was in Winchester jail, and tried for his life, and would have been hanged had it not been for *L*, for breaking open the granary of farmer *A*, and stealing his bacon.' The defendant is liable¹. Again: The defendant says of the plaintiff, 'He was arraigned at Warwick for stealing of twelve hogs, and, if he had not made good friends, it had gone hard with him.' The defendant is liable². Again: The defendant says of the plaintiff, 'He is a convict, and has been in the Ohio penitentiary.' The plaintiff is entitled to maintain an action, the words being false³.

Indeed it could not be right in any case to make it the test, that the imputation *subjects* the accused to danger of punishment, for an 'imputation' merely would not be likely to bring on punishment even if the accused were guilty⁴; and when the accused is innocent, as he must be to maintain an action

c. 51 (1891), Slander of Women Act. But a charge of unchastity merely, not being indictable, is not actionable without proof of special damage. See Odgers, Slander and Libel, 90, 3rd ed. Among American cases—the English rule prevails in some States, and not in others, in regard to imputations against women—see Pollard v. Lyon, 91 U. S. 225; Loranger v. Loranger, 115 Michigan, 681; Robertson v. Edelstein, 104 Wisconsin, 440; Brown v. Nickerson, 5 Gray (Mass.) 1; Davis v. Carey, 141 Penn. St. 314; Brooker v. Coffin, 5 Johnson (New York), 188.

¹ Carpenter v. Tarrant, Cas. Temp. Hardw. 339. The words were false.

² Halley v. Stanton, Croke Car. 268. The words were false.

³ Smith v. Stewart, 5 Barr (Pennsylvania), 372. It would be otherwise if the words were true. Baum v. Clause, 5 Hill (New York), 199. A person is no longer a felon after suffering the punishment of felony; so that the fact that he was once a felon would not sustain a plea of the truth of a charge of felony. Leyman v. Latimer, 3 Ex. Div. 352.

⁴ See the rule in Lumby v. Allday, 1 Cr. & J. 301; s. c. 1 Tyrwh. 217 and 35 R. R. 715; Capital and Counties Bank, 7 App. Cas. 771, 772, Lord Blackburn.

for defamation, it is legally speaking impossible that the imputation should lead to punishment. The most that could be said is, that the imputation might perchance lead to an arrest and then possibly to a trial of the accused. It is enough then that the offence charged (being scandalous if a misdemeanor) is punishable, in the first instance, by imprisonment.

§ 5. IMPUTATION OF HAVING A CONTAGIOUS OR INFECTIOUS DISEASE OF A DISGRACEFUL KIND

By the early common law a charge to come under this head must have been of the having the leprosy, or the plague, or the syphilis. At the present time the rule has come to be so far enlarged as to require the forbearance from publishing false accusations concerning another of the having any disease of a contagious or infectious nature involving disgrace. For example: The defendant falsely charges the plaintiff with having the gonorrhœa. This is actionable *per se*¹.

This doctrine of law proceeds upon the ground that charges of such a kind tend to exclude a person from society; and the rule requires the charge to be made in the present tense. To accuse another of the having had a disgraceful disease is deemed not actionable without proof of special damage. For example: The defendant says of the plaintiff, 'She has *had* the pox.' The defendant is not liable though the charge be false, unless the plaintiff prove some actual damage².

§ 6. IMPUTATION AFFECTING THE PLAINTIFF IN HIS OFFICE, BUSINESS, OR OCCUPATION

In order that an imputation may in law be said to affect a man injuriously under this head, and be actionable *per se*, it should have a natural tendency to harm him in his occupation. It is not enough that it may possibly so injure him. If it has not a natural

Natural tendency to harm the test.

¹ *Watson v. McCarthy*, 2 *Kelly* (Georgia), 57. See *Bloodworth v. Gray*, 7 *Man. & G.* 334.

² See *Carslake v. Mapledoram*, 2 *T. R.* 473.

tendency to injure him, that is, if it would not be the usual effect of the charge to injure the plaintiff in his occupation, as by causing discharge, the plaintiff cannot recover without proving special damage. For example: The defendant publishes of the plaintiff, a clerk to a gas-light company, the words, 'You are a disgrace to the town, unfit to hold your situation for your conduct with harlots. You are a disgrace to the situation you hold.' The plaintiff cannot recover without proof of actual damage, the language not having a natural tendency to cause the plaintiff's discharge from his employment¹.

Defamation has a natural tendency to injure the plaintiff in his office, business, or occupation, within the meaning of the rule, in different ways, as when for instance it strikes at his qualification for the performance of the duties of the place, or alleges some misconduct or negligence in the course of transacting these duties², or business embarrassment or want of credit in the case of a merchant³. For example: The defendant charges the plaintiff, a clergyman, holding the office of vicar of a church, with incontinence. This is ground of an action⁴. Again: The defendant says of the plaintiff, a lawyer, the words having relation to the plaintiff's professional qualifications, 'He is a dunce.' This may perhaps be treated as a breach of the defendant's legal duty to the plaintiff⁵.

When the defamation complained of does not show on its face that it was published of the plaintiff in relation to his occupation, this must be made to appear⁶; though even then, as has just been stated, the defamation will not be actionable unless it

¹ *Lumby v. Allday*, 1 Cr. & J. 301; s. c. 1 Tyrwh. 217, and 35 R. R. 715. If the imputation had been of adultery, it would have been actionable per se, under the head of imputations of crime. And the law has been extended by statute in favour of married women. Slander of Women Act, 1891, 54 & 55 Vict. c. 51. Indeed the rule laid down in *Lumby v. Allday*—the natural tendency of the charge, a sound rule in itself—might well have been held enough, and as a new question perhaps now would be, to enable the plaintiff to recover. *Capital and Counties Bank v. Henty*, 7 App. Cas. 771, 772, Lord Blackburn. See *Morasse v. Brocher*, 151 Mass. 567, 576.

² *Lumby v. Allday*, supra.

³ *McIntyre v. Weinert*, 195 Penn. St. 52. ⁴ *Gallwey v. Marshall*, 9 Ex. 294.

⁵ *Peard v. Jones*, Croke Car. 382. It is doubtful whether a court would now treat such a statement as actionable. To call a lawyer a 'cheat' has been held actionable. *Rush v. Cavanaugh*, 2 Barr (Pennsylvania), 187. Further see *Doyle v. Roberts*, 3 Bing. N. C. 835; *Goodenow v. Tappan*, 1 Ohio, 60.

⁶ *Ayre v. Craven*, 2 Ad. & E. 2.

had a natural tendency to injure the plaintiff in his occupation, in the sense already explained. In cases however in which the imputation is alleged to have been made of the plaintiff in his occupation, when the same does not have the natural tendency mentioned, it may be shown by the plaintiff that the defamation *was* published under circumstances which bring the case within the rule of liability. But without such evidence the plaintiff must fail. For example: The defendant charges the plaintiff, as a physician, with incontinence. This does not imply disqualification, or necessarily professional misconduct; and, without evidence connecting the imputation with the plaintiff's professional conduct, he cannot recover¹.

If the imputation in itself come within the rule of liability under this head, it matters not that it was published of a servant, even one acting in a menial capacity. For example: The defendant falsely speaks the following of the plaintiff, a menial servant, before the latter's master, 'Thou art a cozening knave, and hast cozened thy master of a bushel of barley.' The defendant is liable to the plaintiff².

It is probably actionable to impute disqualification of a person holding a merely honorary or confidential office, not of emolument³. It certainly is so to impute to such a person misconduct in the office⁴. For example: The defendant says of the plaintiff, who holds a public office of mere honour, touching his office, 'You are a rascal, a villain, and a liar.' This is a breach of the duty under consideration⁵.

In all cases included under the present section, it is necessary that the plaintiff should have been in the exercise of the duties of the particular vocation at the time of the alleged publication of the defamation⁶. For example: The defendant says of the plaintiff, who had been a lessee of tolls at the time referred to by the defendant, 'He was wanted at *T*'; he was a defaulter there.' The words are not actionable *per se*⁷.

¹ *Ayre v. Craven*, 2 Ad. & E. 2. But see *Morasse v. Brocher*, 151 Mass. 567, 576.

² *Seaman v. Bigg*, Croke Car. 480.

³ *Onslow v. Horne*, 3 Wils. 186.

⁴ *Id.*

⁵ *Aston v. Blagrove*, Strange, 617.

⁶ *Bellamy v. Burch*, 16 M. & W. 590; *Gallwey v. Marshall*, 9 Ex. 294. See *Ritchie v. Widdemer*, 59 New Jersey, 290.

⁷ *Bellamy v. Burch*, *supra*. Some of the old cases are *contra*, but they were overruled.

§ 7. IMPUTATION TENDING TO DISINHERIT THE PLAINTIFF

If the words tend to impeach a present title of the plaintiff, the action, though commonly called an action for *slander* of title, is not properly speaking an action of slander; as **Doubt in regard to such cases.** has already been stated, such a case is ground for a special action, governed by rules of law distinct from those of defamation¹.

Cases of actions for defamation tending to defeat an expected title are rare, and appear to have been confined to charges impeaching the legitimacy of birth of an heir-apparent. Such an imputation has been deemed actionable, as being likely to cause the plaintiff's disinheritance². But that is unsound doctrine, and has met with no favour in modern times. The reason is plain; the act complained of is no violation of any legal right, since the heir-apparent can have no legal right to the inheritance. The ancestor owns the estate, and may do as he will with it³. Damage must be proved.

§ 8. IMPUTATION CONVEYED BY WRITING, PRINTING, OR THE LIKE; THAT IS, LIBEL

The preceding sections exhaust the possible heads of oral defamation, actionable per se; that is, of slander. Libellous **Definition of libel.** defamation may also be conveyed in any of the four ways above considered; but it may also be conveyed in other ways. A libel is a writing, print, picture, or effigy, calculated to bring one into hatred, ridicule, or disgrace⁴. The wrong is a crime as well as a tort⁵.

The definition shows that the law of libel is of wider extent than that of slander. Many words when written or printed **Libel wider than slander.** become actionable per se which, if they had been orally published, would not have been actionable

¹ See ante, pp. 78-81.

² *Humphrys v. Stanfeild*, Croke Car. 469.

³ *Onslow v. Horne*, 3 Wils. 188; *Hoar v. Ward*, 47 Vermont, 657.

⁴ On the vagueness of this definition a remark has been made, ante, p. 138, note.

⁵ See Kenny, *Outlines of Criminal Law*, 307.

without proof of special damage. And besides these there is the whole class of defamatory representations, such as picture and effigy, which in their nature are incapable of oral publication. Whether the distinction is well founded or not, the manner of the publication, as libel, makes it actionable¹. For example: The defendant writes and publishes of the plaintiff the following: 'I sincerely pity the man that can so far forget what is due not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods.' The plaintiff can maintain an action for libel². Again: The defendant prints the following of the plaintiff: 'Our army swore terribly in Flanders, said Uncle Toby; and if Toby was here now, he might say the same of some modern swearers. The man at the sign of the Bible [the plaintiff] is no slouch at swearing to an old story.' The imputation is libellous, though not importing perjury³. Again: The defendant prints the following of the plaintiff: 'Mr Cooper [the plaintiff] will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there.' The publication of this language is deemed libellous⁴.

At common law, no immunity is conferred upon the proprietors, publishers, or editors of books, newspapers, or other prints, for the publication of defamation⁵. They are liable for the publication of libellous matter in their prints, though the publication may have been made without their knowledge or even against their orders. This is not true of newsvendors⁶. And it is held that if the alleged libel were of such a nature that a man of common intelligence could not know that it was intended for a libel, and it was not in fact known that it was, neither the editor nor the

¹ *Thorley v. Kerry*, 4 Taunt. 355; *Haynes v. Clinton Printing Co.*, 169 Mass. 512.

² *Thorley v. Kerry*, *supra*.

³ *Steele v. Southwick*, 9 Johnson (New York), 214.

⁴ *Cooper v. Greeley*, 1 Denio (New York), 347.

⁵ See the Statute of 6 & 7 Vict. c. 96, as to apologies.

⁶ *Emmens v. Pottle*, 16 Q. B. Div. 357.

proprietor of the printing establishment, or of the print, would be liable¹.

The distinction between slander and libel, making libel a crime as well as a tort, has its roots in the feudal age. Written defamation, in rhyming lampoon, was then a conspicuous and typical weapon of attack between great men; while slander, though also then as now in use among men of high degree and sometimes punished as a crime, was common property for everybody—it was the billingsgate of the lower classes, for whom no man cared. And the parties, high or low, squared the account on the spot. How bitter and dangerous the libel of those coarser times may be seen in such a one as the Ballad of Richard of Almain², lampooning the King's brother for cowardice at the battle of Lewes (1264)³. One can well understand that libel then should have been held a crime. The (abolished) Statute of Scandalum Magnatum⁴ was a direct expression of the law; but the idea of danger in the written word itself, by easy confusion, took root—did the line ‘Vox emissa volat, littera scripta manet’ help the idea?—and hence the law of libel. This has one justification in modern times, to wit, in the dangers of the press. As for the rest, the distinction in question, and other distinctions between slander and libel, are of little importance; people do not trouble the courts much, in the greater concerns of modern life, with petty causes of either kind⁵.

§ 9. TRUTH OF THE CHARGE

The truth of the charge, whether the charge was made orally or by printed or written language, if fully proved⁶, is, in the absence of statute⁷, a defence to an action for damages for

¹ *Smith v. Ashley*, 11 Metcalf (Mass.), 367. See also *Emmens v. Pottle*, supra.

² *Percy's Reliques*, i. 246 (Bohn).

³ *Wright's Political Songs* (Camden Soc.) contains others. See *Law Quarterly Review*, July, 1902, p. 261.

⁴ See *Odgers, Slander and Libel*, 94, 447, 503, 3rd ed.

⁵ See ante, p. 138, note.

⁶ If the charge contains particulars, all must of course be established if the truth is set up. It is a dangerous defence to plead, for to fail in establishing it shows malice, in the absence of statute. See *Odgers, Slander and Libel*, 201, 3rd ed. On the whole subject see *id.* chap. vii.

⁷ As to criminal prosecutions for libel see 6 & 7 Vict. c. 96, § 6.

the publication of alleged defamation though malicious and not reasonably believed to be true¹. Evidence of such a fact shows indeed that the charge is not legally defamatory. A person has no right to a false character; and his real character suffers no damage, such at least as the law recognizes, from speaking the truth.

This rule appears to go to the extent of justifying a party in publishing of another the fact that he has suffered the penalty of the law for the commission of crime, even though he may have been pardoned therefor and have since become a good and respectable citizen. For example: The defendant publishes of the plaintiff the statement that the latter had several years ago stolen an axe. That is true, though, after conviction therefor, the plaintiff was pardoned, and has since become a trusted citizen and an office-holder. The accusation is deemed justifiable in law².

Belief in the truth of the accusation however is not a defence³, though the law allows the defendant to show it in mitigation of damages⁴. The charge being renewed in the allegation that it was true, must be fully made out by the defendant. And this is equally true of the editors and publishers of books, newspapers, or periodicals, as of other persons⁵.

The truth of effigy, picture, or sign, so far as such may relate to the physical person of the party intended, and not to his character, is (probably) no justification of a malicious publication. A man is not responsible for his physical peculiarities, and may well invoke protection of the law against one who will parade them before the public⁶.

¹ *McCloskey v. Pulitzer Publishing Co.*, 152 Missouri, 339.

² *Baum v. Clause*, 5 Hill (New York), 199. See *Rex v. Burdett*, 4 B. & Ald. 314, 325.

³ *Campbell v. Spottiswoode*, 3 Best & S. 769; *Smith v. Johnson*, 69 Vermont, 231.

⁴ *Odgers, Slander*, 363, 607, 3rd ed. ⁵ *Campbell v. Spottiswoode*, *supra*.

⁶ Compare *Pollard v. Photographic Co.*, 40 Ch. D. 345, 353, enjoining display of photograph; *Hanfstaengl v. Empire Palace*, 1894, 2 Ch. 1; *Hanfstaengl v. Newnes*, 1894, 3 Ch. 109. But see *Dockrell v. Dougall*, 78 Law T. Rep. 840; *Atkinson v. Doherty*, 80 N. W. Rep. (Michigan), 285, denying the so-called right of privacy.

§ 10. PRIVILEGED COMMUNICATIONS: MALICE

The plaintiff in an action for defamation is entitled to recover upon proof of the publication (with special damage if the case does not fall under one of the four heads); **Malice not necessary to the action.** proof of malice, in other words malice as an entity, is not necessary, in any sense of the term, to make a case. It has indeed been common to say that malice is presumed or implied upon proof of the publication; but that means nothing, and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice, touching the making a *prima facie* case, is only a name arbitrarily applied; it is simply a fiction.

If this were all, the result would be that, unless the defendant could prove the truth of the charge, he would be liable. But this would be to lay an embargo upon the freedom of speech not to be tolerated. **Occasion may justify defamatory publication.** There are circumstances under which men must be permitted to speak their convictions, however erroneous; the law could not but permit, and hence does permit it¹. There are, in a word, occasions in which one is excused for publishing what would otherwise be actionable defamation². The publication of the charge in such cases is said to be 'privileged'; the charge itself being termed a privileged communication.

It is obvious that the 'occasions' mentioned may be of different importance; they may be slight, they may be of the greatest moment. Between man and man, in the ordinary business of life, they may be slight as compared with occasions when public justice or the public interest is at stake; for it is plain that public, and very soon thereafter private, welfare would

¹ The doctrine of privileged communications is only a special example of a great law of privilege pertaining to human affairs generally; to wit, the right to inflict harm upon another in just so far as may reasonably be deemed necessary for one's own protection, or for the protection of another where that is proper. So far others must yield, or the vindication of rights in many cases would be an empty name; further no one is required to give way.

² *Merivale v. Carson*, 20 Q. B. Div. 279, 280; Lord Esher pointing out that what all men may do is no privilege.

suffer if a high order of privilege were not extended to such cases. The occasions have been divided into two classes, simply, for it would be impracticable to maintain a series of progressive grades, according to the supposed importance of each occasion.

Privileged communications are accordingly of two kinds; and these have been called absolutely privileged and *prima facie* privileged communications. Absolute privilege imports that the privilege cannot be overturned by evidence that the publication was made with malice (as an entity); *prima facie* privilege, that the privilege may be overturned by such evidence. Here then, in answer to a *prima facie* privilege, set up in defence, is the domain of malice, as a subject of proof, in regard to the right of action for defamation.

Apart from statute, absolute privilege is confined to the State, and that too to its three departments, judicial, legislative, and executive¹; such privilege being justified, and as has already been intimated required, upon grounds of necessity.

Kinds of privilege.
Absolute privilege:
what it includes:
proceedings of the courts.

First, then, of privilege in judicial proceedings. The following is the general rule: Whatever is said orally, or stated in writing, in the course of and duly relating to such proceedings by those concerned therein, is absolutely privileged. According to recent authority, it matters not whether the language was material or relevant, or not; it is deemed to be against public policy to permit any inquiry on that point². It is enough if it relates to the cause before the court. For example: Counsel for the defendant, in the course of arguing a criminal cause, makes base insinuations against the prosecutor in relation to the evidence given, which insinuations would be actionable if not privileged. No action can be maintained for making them; no inquiry into their bearing upon the case will be allowed³. Again: A witness on the stand, after examination, volunteers a statement in vindication of himself,

¹ Including, it seems, in America, the chief executive of a city, in his official communications. *Trebilecock v. Anderson*, 117 Michigan, 39; *Wachsmuth v. Merchants' Bank*, 96 Mich. 427.

² *Munster v. Lamb*, 11 Q. B. Div. 588 (counsel); *Scott v. Stansfield*, L. R. Ex. 220 (judge); *Seaman v. Netherclift*, 2 C. P. Div. 53 (witness); *Henderson v. Broomhead*, 4 H. & N. 569 (statements in pleadings).

³ *Munster v. Lamb*, 11 Q. B. Div. 588.

which contains a charge of crime against a stranger to the trial. This is not actionable¹.

The protection extends to the allegations contained in affidavits made in the course of a trial², even though the persons making them be not parties to the cause³; and to statements of a coroner holding an inquest⁴. In a word, it applies apparently to all statements made in the real discharge of duty in court.

**How far the
privilege
extends.**

The law upon this subject has been thus (in substance) generalized: No action either for slander or libel can be maintained against a judge, magistrate, or person sitting in a judicial capacity over any court, judicial, military⁵, or naval, recognized by and constituted according to law; nor against suitors, prosecutors, witnesses, counsel, or jurors, for anything said or done relative to the matter in hand, in the ordinary course of a judicial proceeding, investigation, or inquiry, civil or criminal, by or before any such tribunal, however false and malicious it may be⁶.

A like rule of law to that by which defamatory statements made in the course of judicial proceedings are privileged governs all statements and publications made in the course of the proceedings of the Legislature⁷. The occasion is deemed to afford an absolute justification for the use of language otherwise actionable, so long as it relates to the proceedings under consideration. No member of the Legislature is liable in a court of justice for anything said by him in the transaction of

¹ *Seaman v. Netherclift*, supra. In America the question of relevancy may be inquired into, so far as the belief of the defendant is concerned. If he believed that what he said was relevant or pertinent, the privilege exists; contra if he did not so believe. See *Hastings v. Lusk*, 22 Wendell (New York), 410; *Dunham v. Powers*, 42 Vermont, 1. See *Hoar v. Ward*, 3 Metcalf (Mass.), 193, 197, 198.

² *Garr v. Selden*, 4 Comstock (New York), 91.

³ *Henderson v. Broomhead*, 4 H. & N. 569.

⁴ *Thomas v. Churton*, 2 Best & S. 475.

⁵ *Jekyll v. Moore*, 2 Bos. & P. N. R. 341; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255; s. c. 7 H. L. 744, 752 (witness); *Dawkins v. Saxe-Weimar*, 1 Q. B. D. 499.

⁶ *Starkie*, Slander and Libel, 184 (4th ed. by Folkard); *Munster v. Lamb*, 11 Q. B. Div. 588, and cases cited.

⁷ 3 & 4 Vict. c. 9; *Odgers*, Slander, 208, 3rd ed.

the business of the House to which he belongs, or in which he has duties to perform, however offensive the same may be to the feelings or injurious to the reputation of another¹.

This privilege however is absolute only within the walls of the House, or of such other places as committees are authorized to occupy². It is not personal, but local. A member who publishes slander or libel generally, outside of such locality, stands, it seems, on the same footing with a private individual³. For example: A member of Parliament prints and circulates generally a speech delivered by him in the House, containing defamatory language of the plaintiff. This is a breach of duty⁴.

The same protection is extended to persons presenting petitions to the Legislature, and with the same restriction. The printing and exhibiting a false and defamatory petition to a committee of the Legislature, and the delivery of copies thereof to each member of the committee, is justifiable, unless perhaps the petition is a mere sham, fraudulently put forth for the purpose of defaming an individual. But a publication to any others than the members of the committee, or at any rate to others than members of the Legislature, removes the protection, and renders the author liable⁵.

Absolute privilege extends also to the acts and proceedings of the Executive Department, whether of the general government of the country or of the colonies⁶, or, perhaps, of cities⁷.

**Proceedings
of the
Executive.**

In other relations than those of the State, there is seldom

¹ See *Ex parte Wason*, L. R. 4 Q. B. 573; *Commonwealth v. Blanding*, 3 Pickering (Mass.), 304, 314; *Coffin v. Coffin*, 4 Mass. 1; *Hastings v. Lusk*, 22 Wend. 410, 417; *McGaw v. Hamilton*, 184 Penn. St. 108.

² *Goffin v. Donnelly*, 6 Q. B. D. 307. See 3 & 4 Vict. c. 9 (1840).

³ See however *Coffin v. Coffin*, *supra*, as to words not in the course of business.

⁴ *Rex v. Abingdon*, 1 Esp. 226; *Rex v. Creevey*, 1 Maule & S. 273; *Stockdale v. Hansard*, 9 Ad. & E. 1. As to private circulation of speeches among constituents, see *Wason v. Walter*, L. R. 4 Q. B. 73, 95. On the general subject of *Stockdale v. Hansard*, *supra*, see the statute 3 & 4 Vict. c. 9 (1841).

⁵ *Lake v. King*, 1 Saund. 131 b, where this is conceded; *Hare v. Miller*, 3 Leon. 138, 163. See *Proctor v. Webster*, 16 Q. B. D. 112, as to communications to the Privy Council.

⁶ See *Chatterton v. Secretary of State*, 1895, 2 Q. B. 189; *Spalding v. Vilas*, 164 U. S. 483; *ante*, p. 29.

⁷ *Ante*, p. 152, note 1.

any cause for absolute privilege; between man and man, outside of the affairs of State, the occasion can create **Prima facie privilege.** only a prima facie privilege. The defendant here shows grounds of privilege as before; but now, it should be noticed, the plaintiff may in turn show (actual) malice, and so cut away the ground of the supposed privilege, for prima facie privilege rests on good faith. It is founded upon interest or duty, as will appear later.

This head of privilege embraces a great variety of cases; only the most important of these will be presented.

Proceedings before church organizations, societies, clubs, and other voluntary bodies, touching the objects for which they are formed, may be mentioned first. **Proceedings of voluntary societies.** such bodies, for the discipline of their members, partake somewhat of the nature of trials in the courts. Though forming no part of the general administration of justice, such proceedings, when not in conflict with the law, are sanctioned by the State. Accordingly, language used in conducting them is probably privileged, prima facie, so far as it is pertinent to the matter under consideration. For example: The defendant, while on trial before a church committee for alleged falsehood and dishonesty in business, says of the plaintiff, 'I discharged him for being dishonest,—for stealing. That is the cause of this trouble.' The defendant is not liable in the absence of evidence that he was actuated by express malice¹.

The proceedings of the courts of justice should, with some necessary exceptions, be under the eyes of the public, so that judges may sufficiently feel their responsibility². **Publication of proceedings of the courts.** But the whole public cannot attend the courts, and it is proper therefore that such of their proceedings as are open should be made known generally. It is accordingly laid down that the publication of proceedings had in open court, if sufficiently full to give a correct and just impression of the proceedings, and if not attended with defamatory comments, is prima facie privileged³. If however the same should

¹ *York v. Pease*, 2 Gray (Mass.), 282; *Farnsworth v. Storrs*, 5 Cushing (Mass.), 412. Probably the language need not be legally relevant.

² *Cowley v. Pulsifer*, 137 Mass. 392.

³ See *Stevens v. Sampson*, 5 Ex. Div. 53, as to reports furnished by one not connected with the newspaper.

be so incomplete or so stated as to give a wrong impression, or, though full, if it is followed by comments containing defamatory matter, the privilege would fail, and the publisher, editor, and author would be liable for any defamation thereby spread. For example: The defendant prints a short summary of the facts of a certain case in which the plaintiff has acted as attorney. The account of the trial states that the then defendant's counsel was extremely severe and amusing at the expense of the present plaintiff. It then sets out parts of the speech of the defendant's counsel which contain some severe reflections on the conduct of the plaintiff as attorney in that action. The defendant is liable¹.

But it should be clearly understood that the publication of an abridged report of a trial is privileged if it is fair and accurate in substance, so as to convey a just impression of what took place, and is free from objectionable comments²; and so of the publication of proceedings in the Legislature³. It is laid down in America however that this privilege does not extend to the publication of papers in a cause before any proceedings have been taken upon them, as in the case of papers filed and published in vacation⁴. This would not be publishing a proceeding had in open court⁵. Reports from day to day, in the progress of a trial, may be published⁶; and the report of a judgment alone, especially if sufficient to give a just idea of the case, may be published⁷.

The objection to defamatory comments applies equally well when they are put into the form of a heading to the report. For example: The defendant prints an account of a trial in which the plaintiff was involved, heading the same 'Shameful conduct of an attorney,' referring to the plaintiff. The publication is not privileged⁸.

¹ *Flint v. Pike*, 4 B. & C. 473.

² *Turner v. Sullivan*, 6 Law T. n. s. 130; *Wason v. Walter*, L. R. 4 Q. B. 73, 87.

³ *Wason v. Walter*, supra. See 3 & 4 Vict. c. 9 (1840). Contra of matters not fit for publication. *Steele v. Brannan*, L. R. 7 C. P. 261.

⁴ *Cowley v. Pulsifer*, 137 Mass. 392.

⁵ *Id.* p. 394, Holmes, J.

⁶ *Lewis v. Levy*, El. B. & E. 537; *Cowley v. Pulsifer*, 137 Mass. 392, 395.

⁷ *Macdougall v. Knight*, 17 Q. B. Div. 636; 14 App. Cas. 194, 200. See this case again, 25 Q. B. Div. 1, denying the qualification suggested in the House of Lords, 14 App. Cas. at pp. 200, 203.

⁸ *Lewis v. Clement*, 3 Barn. & Ald. 702.

The editor or writer may however use a heading properly indicative of the nature of the trial, if it does not amount to comment. That is, the subject of the trial may be stated. For example: The defendant prints a report of a trial under the heading 'Wilful and corrupt perjury.' But this is only a statement of the charge made against the plaintiff at the trial. There is no breach of duty to the plaintiff¹.

The privilege extends to the publication of *ex parte* judicial proceedings²; it protects the publication alike of preliminary and final proceedings in open court; and this though the tribunal declines to proceed for want of jurisdiction³.

No privilege is conferred, apart from statute, upon the proprietors, editors, or publishers of the public prints for the publication of defamatory matter uttered in the course of public meetings though held under authority of law for public purposes. For example: The defendant prints an account of a public meeting of commissioners of a town, the body acting under powers granted by statute; and the report is a fair and truthful statement of what occurred at the meeting. It however contains defamatory language uttered concerning the plaintiff at the meeting. The defendant is liable⁴.

It is obviously to the advantage of the public that true accounts of the proceedings of the Legislature as well as of the courts should be placed before the people. Upon this principle therefore the publication of such proceedings by any one is privileged, though they contain defamatory matter; though the privilege of *non-official* publication, as in the other cases mentioned, will not cover malicious publications. Without evidence of malice however the protection is complete. For

Any one may
publish pro-
ceedings of
Legislature.

¹ Lewis v. Levy, El. B. & E. 537.

² Usill v. Hales, 3 C. P. D. 319; Kimber v. Press Association, 1893, 1 Q. B. 65, C. A.; Metcalf v. Times Publishing Co., 20 Rhode Island, 674, reviewing the cases.

³ Usill v. Hales, supra; Lewis v. Levy, supra.

⁴ Davison v. Duncan, 7 El. & B. 229. But now see the Law of Libel Amendment Act, 51 & 52 Vict. c. 64, § 4. The second section of this Act repeals 44 & 45 Vict. c. 61, § 2.

example: The defendant publishes a true report of a debate in Parliament, upon a petition presented by the plaintiff for the impeachment of a judge. Defamatory statements against the plaintiff are made in the course of the debate, and these are published with the report. The defendant is not liable in the absence of malice¹.

Communications made to the proper² public authorities, upon occasions of seeking redress for wrongs suffered or threatened, in which the public are concerned, or in which the party making or receiving the communication is alone concerned, fall within the same kind of privilege, if believed to be true by the party seeking redress, unless the communication itself or the facts connected with it show malice. For example: The defendant honestly³ charges the plaintiff with being a thief, the charge being made before a constable acting as such, after the defendant had sent for him to take the plaintiff into custody. The defendant is not liable in the absence of evidence of actual malice⁴.

Upon the same principle honest statements at public meetings, as by a taxpayer and voter at a town meeting held to consider an application from the tax assessors of the town for the use of money for a particular purpose, may be privileged so far as they bear upon the matter before the meeting, though they be defamatory. For example: The defendant, at a town meeting held on application of the tax assessors to consider the reimbursing the assessors for expenses incurred in defending a suit for acts done in their official capacity, honestly but falsely charges the assessors with perjury in the suit. Being a taxpayer and voter, he is not liable to any of the persons defamed, unless shown to have been actuated by malice⁵.

¹ *Wason v. Walter*, L. R. 4 Q. B. 73. The protection in this case was extended also to comments made in an honest and fair spirit.

² *Hebditch v. MacIlwaine*, 1894, 2 Q. B. 54, C. A.

³ 'Honestly' and 'honest' will now be used of belief that an imputation is true, and made in good faith.

⁴ *Robinson v. May*, 2 Smith (New York), 3.

⁵ *Smith v. Higgins*, 16 Gray (Mass.), 251.

A similar protection is extended to persons acting under the management of bodies instituted by law, and having a special function of care over the interests of the public. **Public bodies having special functions.** While honestly acting within the limits of their function, they are prima facie exempt from liability for defamatory publications made. For example: The defendants, trustees of a college of pharmacy,—an institution incorporated for the purpose, among other things, of cultivating and improving pharmacy, and of making known the best methods of preparing medicines, with a view to the public welfare,—make a report to the proper officer concerning the importation of impure and adulterated drugs, falsely but honestly charging the plaintiff with having made such importations; the report being made after investigation caused by complaints made to the defendants of the importation of such drugs. The defendants are not liable unless they acted with express malice towards the plaintiff¹.

The use of the public prints is sometimes justifiable to protect a person against the frauds or depredations of a private citizen; and when this is the only effectual mode of protection, persons are prima facie protected in adopting it even against innocent men. **Use of the press for self-protection.** For example: The defendant, a baker, employing servants in delivering bread in various towns, inserts in a newspaper published in one of the towns a card, stating that the plaintiff 'having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business.' The communication is honest. It is privileged in the absence of evidence of actual malice².

Statements made to the public in vindication of character publicly attacked are privileged, prima facie, if they are honest and made through proper channels³. **Self-vindication.** For example: The defendant publishes a newspaper article containing reflections upon the plaintiff's character, in reply to an article by the plaintiff assailing the defendant's character. The

¹ Van Wyck v. Aspinwall, 17 New York, 190. See Allbut v. General Council of Medical Education, 23 Q. B. Div. 400.

² Hatch v. Lane, 105 Mass. 394.

³ Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495.

defendant acts honestly, in defence of himself. The communication is *prima facie* privileged¹.

Indeed it may not affect the case that the names of other men are drawn into the controversy and tarnished. The party attacked may in reply falsely criminate others if the charges against them are honestly made, are not malicious, and are reasonably deemed necessary for self-vindication. And such reply may be made by the party's agent as well as by himself. For example: The defendant, an attorney, writes and publishes a letter in vindication of the character of one of his clients, in reply to certain charges of conspiracy preferred and published against the latter. The defendant's letter contains defamatory charges against a third person, the plaintiff. The defendant is not liable if he made the charges in reasonable and honest vindication of his client's character, and without actual malice, using terms reasonably warranted under the circumstances in which he wrote².

Communications by a master, or late master, in regard to the character or conduct of his servant, made to a neighbour or other person who is apparently thinking of employing the servant, fall within this category of cases. For example: The defendant, having discharged his servant the plaintiff for supposed misconduct, and hearing that he was about to be engaged by a neighbour, writes a letter to his neighbour, informing him that he has discharged the plaintiff for dishonesty, and that he cannot recommend him; the charge of dishonesty being false, but believed by the defendant to be true. The defendant has a *prima facie* right to make the statement³.

The same is true where there exists a very near relationship, or a pecuniary connection of confidence, between the parties; as in the case of a parent admonishing his daughter against the attentions of a particular person, who

**Master and
servant.**

**Near rela-
tionship.**

¹ *O'Donoghue v. Hussey*, Ir. R. 5 C. L. 124, Ex. Ch.

² See *Regina v. Veley*, 4 Fost. & F. 1117; *Seaman v. Netherelift*, 2 C. P. Div. 53, ante, p. 153; *Wason v. Walter*, L. R. 4 Q. B. 73, ante, p. 158. These three cases taken properly together justify the example, the facts in which vary from *Regina v. Veley*, in making the imputation relate to a third person.

³ *Pattison v. Jones*, 8 B. & C. 578.

is falsely charged with the commission of a crime; or of a partner advising his copartner to have no partnership dealing with another, on the mistaken ground, e.g., that he is a thief.

A confidential relation by pecuniary connection is, for the purposes of this protection, much wider than might be supposed from the case of partners last mentioned. A confidential relation, within the scope of the protection to voluntary communications, (probably) arises wherever a continuous or temporary trust is reposed in the skill or integrity of another, or the property or pecuniary interest, in whole or in part, or the bodily custody, of one person, is placed in charge of another¹. Besides the cases above stated, this definition will cover communications made by an attorney to his client concerning third persons with whom the client is, or is about to be, engaged in business transactions²; communications made to an auctioneer of property concerning the sale by persons interested in the property³; communications of landlords to their tenants imputing immoral conduct to some of the inmates of the premises⁴; and many other cases of a like nature.

In most of the foregoing cases, it will be noticed, the communication was volunteered, and this of necessity; if made at all, it must have been volunteered. That fact accordingly has no bearing upon the question of liability. Indeed the most that can be said of the fact that a communication was volunteered, in a case of privilege, is that it may sometimes be taken, along with other facts, as evidence of malice⁵. Alone however it would probably have no significance.

On the other hand, a communication is not necessarily privileged because of being made upon request, though very often it is privileged. If it should be unnecessarily defamatory under the circumstances, the privilege would be lost. Such fact would indeed show that the writer or speaker was actuated by malice, and would thus

**Voluntary
communi-
cation.**

**Communica-
tion on re-
quest.**

¹ See Bigelow, *Fraud*, i. 262.

² See *Davis v. Reeves*, 5 Ir. C. L. 79.

³ *Blackham v. Pugh*, 2 C. B. 611.

⁴ *Knight v. Gibbs*, 3 Nev. & M. 467.

⁵ See *Pattison v. Jones*, 8 B. & C. 578, 584, Bayley, J.

destroy the protection which might have been available to the party, leaving to the plaintiff his right of redress¹.

Again, a communication made upon request is not protected unless the request come from a proper person. If the one who requested the defendant to make the communication had no duty to perform, and no interest in the matter in question other than that of curiosity, the defendant manifestly is not justified in making the communication. Even the near relatives of a person interested in the subject of the communication cannot by request afford protection to every one to publish defamation of another. For example: The defendant, formerly but not at present pastor of a lady, writes a letter to the lady, on request of her parents, warning her against receiving attention from a certain person, the letter containing false and defamatory accusations against him. The communication is not privileged².

Apart from cases of self-vindication³, the subject of prima facie privilege may be summed up by the following general proposition: A communication believed to be true, and made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a legal or moral duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which, without such privilege, would be actionable⁴.

Prima facie privilege accordingly rests upon duty or interest. It is then a matter of motive; to make the occasion (prima facie) privileged, one must have been led—moved—by duty or interest. That is the test to which every case of the kind should be brought; if the motive of the defendant was not duty or interest, —if for instance it was malice,—there is no ground for the

**Generaliza-
tion of the
subject.**

**Basis of prima
facie privi-
lege-duty or
interest.**

¹ Fryer v. Kinnersley, 15 C. B. N. S. 422.

² Joannes v. Bennett, 5 Allen (Mass.), 169. Would the communication have been privileged had it come from the lady's *present* pastor?

³ In a case of self-vindication, the public, before which the accused may seek to vindicate himself, may have no duty or interest in the matter.

⁴ Harrison v. Bush, 5 El. & B. 344.

privilege. To put the case in another way, if the defendant bring forward facts which show the existence of duty or interest, the question still is, whether that was in fact the motive which governed his conduct in making the publication in question.

No more however is required of the defendant than evidence that he was acting from duty or interest; it is not necessary for him to go further and prove that he believed what he said to be true¹. *That* will be presumed until the plaintiff shows the contrary, or proves malice, or other facts inconsistent with the alleged privilege.

Indeed where the defendant is simply making report to a superior of what his duty requires him to report, such as an accusation made by another against the plaintiff, it cannot, it seems, be material whether the defendant believes the accusation true or not. Enough that in good faith he reports it, as required, to his superior². But apart from such cases,—if the defendant himself makes the accusation,—his belief in the truth of the accusation is relevant. He will indeed be presumed to believe it, but if the plaintiff shows that he does not, or otherwise proves malice, or any other fact inconsistent with the supposed privilege, the plaintiff will be entitled to recover³.

The motive of interest or duty must, as the foregoing implies, be single; a mixed motive, of interest or duty and malice (or like fact), would be fatal to the plaintiff⁴. It is always laid down to be sufficient for the plaintiff to prove that the defendant acted maliciously. In regard to duty, that may be moral as well as legal; in regard to interest, that must, it seems, consist in legal right or in something of the nature of legal right⁵. The duty or interest however must, it seems, be real; it is not enough that the defendant

¹ *Jenoure v. Delmege*, 1891, A. C. 73, Privy Council.

² *Jenoure v. Delmege*, *supra*.

³ *Jenoure v. Delmege*, 1891, A. C. 73; *Pattison v. Jones*, 8 B. & C. 578; *Dawkins v. Paulet*, L. R. 5 Q. B. 94, 102; *Clark v. Molyneux*, 3 Q. B. Div. 237.

⁴ Such is the effect of *Jenoure v. Delmege*, *supra*. But *qu.* whether a person should lose his privilege when reporting a defamatory charge which he was *legally bound* to report, because he does not believe the charge to be true and performs his duty maliciously?

⁵ *Ante*, pp. 10, 11.

supposed that he, and the person addressed¹, had a duty or an interest, if either of them had not.

We have here, it may now be pointed out, the noticeable fact that malice as a motive has a true place in civil liability², though a secondary one,—not in making a *prima facie* cause of action³. Indeed it is laid down that the malice required, when the question of privilege turns on malice, is malice in that very sense,—the popular idea of malice, as an evil motive⁴. Accordingly, external manifestation, such as the common case of excessive zeal, is to be considered as *evidence* of a malicious motive, and not necessarily as malice absolute; the effect of it being capable of being taken away by evidence consistent with zeal but inconsistent with malice.

It follows from what has been said, that no privilege is afforded the mere repetition of defamation; and this is true by the weight of authority, though the party repeating it give the name of the person from whom he received it. The repetition of the language is generally deemed actionable to the same extent, and doubtless with the same qualifications, as in the original publication⁵. For example: The defendant says to a third person concerning the plaintiff, ‘You have heard of the rumour of his failure,’—merely repeating a current rumour that had come to his ears that the plaintiff had failed. The defendant is liable if there was no such relation between him and the party to whom he made the communication as would cause the latter to expect a communication on such matters⁶.

¹ *Hebditch v. MacIlwaine*, 1894, 2 Q. B. 54, C. A. But see *Jenoure v. Delmege*, 1891, A. C. 73, where the Privy Council took it for granted that belief that the right person was addressed was enough.

² We have seen that privilege in one form or another is a general principle of law (ante, p. 151, note); accordingly malice, in the sense of a motive, is in sound theory available generally, and not merely in slander and libel, to overturn the allegation or the presumption of privilege. See ante, pp. 19, 20. Where a man justifies by a motive, as duty or interest, it may certainly be shown that he was not governed by that but by another motive.

³ Ante, pp. 21, 151.

⁴ *Nevill v. Fine Arts Ins. Co.*, 1895, 2 Q. B. 156, 169, Lord Esher.

⁵ *De Crespigny v. Wellesley*, 5 Bing. 392. *Northampton's Case*, 12 Coke, 134, contra on that point is not law.

⁶ *Watkin v. Hall*, L. R. 3 Q. B. 396.

§ 11. CRITICISM

Criticism cannot be defamation, unless it strikes at personal character. It is protected therefore, not because it is privileged, but because it is not defamation¹, or rather because it is not wrongful. This broader ground appears to be the true one; speaking in technical but significant language, it is not necessary to 'justify' criticism. However severe it may be, however unjust in the opinion of men capable of judging, so long as the critic confines himself to what is there called 'fair criticism' of another's works, the act cannot be treated as a breach of duty. But if the critic turn aside from the proper purpose of criticism, and hold up one's character to ridicule, he becomes liable².

The criticism of works of art, whether painting, sculpture, monument, or architecture, falls of course within the rule. For example: The defendant says of a picture of the plaintiff, placed on exhibition, 'It is a mere daub.' The defendant, if fair in his criticism³, cannot be held liable to an action for defamation, however unjust the criticism⁴.

¹ *Merivale v. Carson*, 20 Q. B. Div. 275; *Campbell v. Spottiswoode*, 3 Best & S. 769, 780. This overrules *Henwood v. Harrison*, L. R. 7 C. P. 606, 626, where, as by some American courts, criticism is treated as privileged. Criticism is privileged only in the improper sense that the act in itself is lawful, not that it is made upon an occasion which protects it. Football, every lawful act, resulting in harm, is 'privileged' in the same way. Compare *Lex Aquilia*, fr. 52, § 4; *Grueber*, p. 174. Hence (if this be true) criticism is not wrongful because of being malicious.

² *Id.*; *Carr v. Hood*, 1 Campb. 355, note; *Strauss v. Francis*, 4 Fost. & F. 939 and 1107. See s. c. L. R. 1 Q. B. 379.

³ See *Merivale v. Carson*, 20 Q. B. Div. 275, 280, 283, as to 'fair criticism.' The question is directly put to the jury whether the criticism is 'fair'; which is stated to mean whether, in their opinion, the criticism goes beyond what any fair man, however prejudiced or strong his opinion may be, might express. *Merivale v. Carson*, at p. 280. See also *id.* at p. 283.

⁴ *Thompson v. Shackell*, Moody & M. 187. See *Whistler v. Ruskin*, London Times, Nov. 26, 27, 1878 (*unfair* criticism); *Merivale v. Carson*, *supra*; *Gott v. Pulsifer*, 122 Mass. 235. A recent American case of *Dooling v. Budget Pub. Co.*, 144 Mass. 258, turned upon a distinction between criticism of the plaintiff in his business of caterer and slander of title. The distinction is, that if the comment, being upon property, is true it is criticism, if false it is slander of title.

The conduct too of public men amenable to the public only, and of candidates for public office, is a matter proper for public discussion. It may be made the subject of hostile criticism and animadversion, so long as the writer keeps within the bounds of an honest intention to discharge a duty to the public, and does not make the occasion a mere cover for promulgating false and defamatory allegations. The question in such cases therefore is, whether the author of the statements complained of has transgressed the bounds within which comments upon the character or conduct of a public man should be confined;—whether, instead of fair comment, the occasion was made an opportunity for gratifying personal vindictiveness and hostility¹, as by making false charges of disgraceful acts². In a word, fair criticism or comment upon the real acts of a public man is one thing; it is ‘quite another to assert that he has been guilty of particular acts of misconduct³.’ Criticism of public men should be limited to matters touching their qualifications for the performance of the duties pertaining to the position which they hold or seek⁴.

If however an officer, or an office sought, be not subject to direct control by the public,—if the same be subordinate to the authority of some one having a power of removal over the incumbent,—then (probably) there exists no right to animadvert upon the conduct of such subordinate officer or candidate through public channels. For in such a case the question appears to be one of capacity or of fitness for a particular position. Though engaged in business of the public, the officer is not a ‘public man’ but a servant. The proper course to pursue in case of supposed incapacity or unfitness of the party for the position would be to state the case to the superior officer alone, and call upon him to act accordingly.

¹ *Campbell v. Spottiswoode*, 3 Best & S. 769, 776; *Merivale v. Carson*, 20 Q. B. Div. 275, 283.

² *Davis v. Shepstone*, 11 App. Cas. 187.

³ *Id.* at p. 190.

⁴ The American courts differ however, or appear to differ, as to how far criticism of public men may go. See on the one hand *Hamilton v. Eno*, 81 New York, 116; *Curtis v. Mussey*, 6 Gray (Mass.), 261. On the other hand see *Palmer v. Concord*, 48 New Hampshire, 211; *Mott v. Dawson*, 46 Iowa, 533.

It must be understood that the law of slander and libel applies only to defamation in pais: that is, to defamatory charges not prosecuted in a court of justice. If **Limits of law of defamation.** the defamation consist of an accusation prosecuted in court, the accused must seek his redress by an action for malicious prosecution, in regard to which the right to recover depends, as has been seen, upon very different rules of law¹.

¹ See chapter iii.

CHAPTER VIII

ASSAULT AND BATTERY

Statement of the duty. *A* owes to *B* the duty not (1) to attempt with force to do hurt to his person, within reach; or (2) to hit or touch him intentionally, or recklessly as in rudeness, or in the commission of any trespass or crime.

There is so much in common in the law of the two wrongs of assault and battery, and the two are so often coincident, that the terms are frequently used without discrimination. 'Assault' is constantly used in the books of cases of contact, making it include 'battery.' But assault without contact is a wrong equally with battery: and it will be convenient and advisable to consider the two subjects separately, however similar the law in regard to them.

§ 1. ASSAULT (WITHOUT CONTACT): WHAT MUST BE PROVED, ETC.

An assault (without contact) is an attempt, real or apparent, to do hurt to another's person, within reach. It is an *attempt*

Definition. to do bodily harm, stopping short of actual execution¹. To prove such an attempt entitles the plaintiff, presumptively, to recover. If the attempt be carried out by physical contact, the act becomes a battery; but the act is equally unlawful and actionable when it stops with a mere

¹ Words are no assault; but they may be a menace and so actionable, with proof of damage. Bigelow's L. C. Torts, 225-227.

attempt to inflict hurt. It is not alone a blow that, because of unpermitted contact with the person, is unlawful. The sensibility to danger may be intentionally shocked; and feelings so affected are within the protection of the law quite as much as the feeling produced by blows. Damage is not necessary; it is actionable for *A* to shake his fist in the face of *B*¹. If damage were to be required as a condition to the right, the weak and the defenceless might be put and kept in terror by common rowdies.

In ordinary cases of assault the question whether the defendant *actually* intended to do the bodily harm cannot, as the

Intention: definition implies, enter into the case². If reason-
fear. able fear of present bodily harm has been caused by the threatening attitude, the effect of an assault has been produced; and not even a disclaimer by the wrongdoer coincident with his act could, it seems, prevent liability. One may well complain of a man who points a pistol at one, though the man truly declare that he does not intend to shoot³; for the ordinary effect of an assault, the intended putting one in *fear*, is produced⁴.

But an expressed purpose, or want of purpose, in a particular set of facts, may well be a determining fact in solving a doubt; that is, it may be such a part of the act in question as to turn the scales in deciding whether an assault has been

¹ Bacon's Abr. 'Assault and Battery,' A.

² But an assault, strictly speaking, cannot, it seems, be committed by negligence, so as to be actionable without proof of special damage. Compare *Spade v. Lynn R. Co.*, 168 Mass. 285, 290; s. c. 172 Mass. 488. Note the difference accordingly between intended harm by attempt, and harm due to negligence. Ante, pp. 26, 27.

³ See *Reg. v. St George*, 9 Car. & P. 483, 493, Parke, B.; Bacon's Abr. 'Assault and Battery,' A; 1 Hawkins, P. C. 110; Pollock, Torts, 211, 6th ed., doubting *Blake v. Barnard*, 9 Car. & P. 626, 628, and *Reg. v. James*, 1 C. & K. 530. *Reg. v. St George*, ut supra, 'would almost certainly be followed at this day.' Pollock, Torts, 211, 6th ed. But see *Reg. v. Duckworth*, 1892, 2 Q. B. 83.

⁴ It may not be necessary however to an assault that this effect should be produced. A person assaulted may be entirely fearless, feeling sure that the blow will not fall. Again, one may probably be assaulted in the dark without knowing it. But the putting in fear is the ordinary effect, and what *might* well put in fear is probably a test. Intent to *harm* is unnecessary; intent to put in fear is necessary.

committed. A denial of present purpose to do harm, or any language indicating a want of such purpose, may serve, under the circumstances, to prevent any reasonable fear of present bodily harm. If then it appear that the supposed wrong was committed in such a manner that the plaintiff must have known that no present violence was intended, the act is not an assault. For example: The defendant, on drill as a soldier, putting his hand upon his sword, says to the plaintiff, 'If it was not drill-time, I would not take such language from you.' This is not an assault, since the language used, under the circumstances, shows that there was no attempt, real or apparent, to do violence¹.

If however the plaintiff has reason to believe, from the defendant's hostile attitude, that harm is intended, there is an assault, whether the defendant did or did not intend *harm*. So at least it is held in America, for the purpose of civil redress. For example: The defendant in an angry manner points an unloaded gun at the plaintiff, and snaps it, with the apparent purpose of shooting. The gun is known by the defendant to be unloaded; but the plaintiff does not know the fact, and has no reason to suppose that it is not loaded. The defendant is liable for an assault, though he could not have intended to shoot the plaintiff².

The parties must generally have been within reach of each other, not necessarily within arm's reach, for an assault may be committed (as already appears) by means of a weapon or missile; and in such a case it is only necessary that the plaintiff should have been within reach of the projectile. And even when the alleged assault is committed with the fist, it is not necessary that the plaintiff should have been within arm's reach of the defendant, provided the defendant was advancing to strike the plaintiff, and was restrained by others from carrying out his purpose when almost within reach of the plaintiff. For example:

**Parties must
be within
reach of each
other: excep-
tions.**

¹ See *Taberville v. Savage*, 1 Mod. 3.

² *Beach v. Hancock*, 27 New Hampshire, 223. On the criminal side see *Commonwealth v. White*, 100 Mass. 407; *Reg. v. James*, 1 C. & K. 530, and *Reg. v. St George*, 9 C. & P. 483, ut supra; *Kenny, Outlines of Criminal Law*, 152, 153.

The defendant advances toward the plaintiff in an angry manner, with clenched fist, saying that he will pull the plaintiff out of his chair, but is arrested by a person sitting next to the plaintiff between him and the defendant. The act is an assault, though the defendant was not near enough to strike the plaintiff¹.

In like manner, if the defendant should cause the plaintiff to flee in order to escape violence, he may be guilty of an assault, though he was at no time within reach of the plaintiff; it is enough that flight or concealment becomes necessary to escape the threatened evil. For example: The defendant on horseback rides at a quick pace after the plaintiff, then walking along a foot-path. The plaintiff runs away, and escapes into a garden; at the gate of which the defendant stops on his horse, shaking his whip at the plaintiff, now beyond danger. This is an assault².

The essential idea of an assault appears to lie in the attempt, real or apparent, to do the harm. The attempt, as we have **Attempt, real or apparent.** seen, need not be real; enough that it reasonably appears to be real. But does this mean that the attempt need not be an attempt upon the *plaintiff*? *A* makes an assault with a pistol upon *B*; *C* who is present reasonably supposes that the assault is made upon him,—either upon him alone, or upon himself and *B*; is *A* liable to *C*? There is reason to think that he is; the case contains all the elements of the idea of an assault; there is an ‘apparent attempt’ to do hurt to *C*. Accordingly several persons—perhaps half-a-dozen persons—might have an action for an assault not intended against any of them. But this would be true only of persons against whom it was reasonable to suppose, on the facts, that an assault was intended. The fact too should be emphasized, that there must have been an *attempt*, or reasonable ground to suppose an attempt, to do hurt, and this to the person of the *plaintiff*. This appears to be of the essence of an assault.

¹ *Stephens v. Myers*, 4 Car. & P. 349.

² *Mortin v. Shoppee*, 3 Car. & P. 373.

§ 2. BATTERIES: WHAT MUST BE PROVED, ETC.

A battery consists in the unpermitted application of force by one man to the person of another. Proof of such fact is enough to make a *prima facie* case. A battery **Definition:** therefore is distinguishable from an assault in the **contact.** fact that physical contact is necessary to accomplish it. But there is another and deeper distinction. The distinction of contact is only a distinction of fact, and that too of an unnecessary fact if that be all; because there would be a right of action without the contact. The deeper distinction is that a battery may be committed upon a man who was not assaulted, that is, who, but for the contact, might have no right of action. A battery is not an application of force by way of an attempt, real or apparent, to do hurt to the plaintiff's person; it is only an unpermitted application of force to the plaintiff's person. A different element enters into the definition of an assault. A man shoots at a mark, in a highway, contrary to law, and hits a person whom he did not see or suppose to be present. That, it seems, would be a battery, though there was no assault upon any one. A number of boys fire off a cannon in the highway, in violation of law. The cannon explodes and a piece of it hits the plaintiff. That too, it seems, would be a battery, though there was no assault. It follows that a battery is a distinct kind of wrong, and calls for consideration accordingly. So, on the whole, it seems.

Turning now to the subject of contact, it should be stated that this need not be effected by a blow; any forcible contact may be enough. For example: The defendant, an overseer of the poor, cuts off the hair of the plaintiff, an inmate in the poor-house, contrary to the plaintiff's will, and without authority of law. This is a battery, and the defendant is liable in damages¹. Again: The defendant, in passing through a crowded hall, pushes his way in a rude manner against the plaintiff. This is also a battery².

¹ *Forde v. Skinner*, 4 Car. & P. 239.

² *Cole v. Turner*, 6 Mod. 149. Would there have been an assault, necessarily, in this case, had there been no contact?

It is not necessary that the defendant should come in contact with the plaintiff's body. It is sufficient if the blow or touch come upon the plaintiff's clothing. For example:

Contact. The defendant, in anger or rudeness, knocks off the plaintiff's hat. This is enough to constitute a battery¹.

Indeed it is not necessary that the plaintiff's body or clothing be touched. To knock a thing out of the plaintiff's hands, such as a staff or cane, would clearly be a battery; and the same would be true of the striking a thing upon which he is resting for support, at least if this cause to the plaintiff a fall or concussion. For example: The defendant strikes or kicks a horse upon which the plaintiff is riding, or a horse hitched to a waggon in which the plaintiff is riding. This is a battery². Again: The defendant drives a vehicle against the plaintiff's carriage, throwing the plaintiff from his seat. This also is a battery³. Again: The defendant runs against and overturns a chair in which the plaintiff is sitting. This too is a battery⁴.

What has already been said shows also that it is not necessary to constitute a battery that the touch or blow or other contact should come directly from the defendant's person. Indeed a battery may be committed at any distance between the parties if only some violence be done to the plaintiff's person. The hitting one with a stone or other missile is no less a battery than the striking one with the fist. It is not necessary even that the object cast should do physical harm; the battery consists in the unpermitted contact, not in the damage. For example: The defendant spits or throws water upon the plaintiff. This is a battery, though no harm be done⁵.

In earlier times it appears to have been considered that a

¹ Addison gives this as an example of a battery, without citing authority; but there can be no doubt of its correctness. Addison, Torts, 571 (4th ed.).

² *Clark v. Downing*, 55 Vernon, 259; *Dodwell v. Burford*, 1 Mod. 24. Probably it would not be necessary that the plaintiff should be thrown from the horse or thrown against anything.

³ *Hopper v. Reeve*, 7 Taunt. 698.

⁴ *Id.* It was of course held immaterial in this case whether the chair or carriage belonged to the plaintiff or not.

⁵ See *Regina v. Cotesworth*, 6 Mod. 172; *Pursell v. Horn*, 8 Ad. & E. 602.

battery might be committed merely by negligence. For example: The defendant, a soldier, handles his arms so carelessly in drilling as to hit the plaintiff with them. This is deemed a battery, though the act was not intended¹. The above-mentioned case of the running into the plaintiff's carriage might be another example². But there is reason to doubt whether cases short of actual or virtual intention, or recklessness, would now be actionable without proof of *damage*; which makes the distinction between cases of assault or battery and bodily injury by negligence. A rowdy might terrorize a whole neighbourhood if damage had to be proved for an assault or a battery, a ground of liability having no application to negligence.

But a person may be guilty of a battery where his act is directly caused by another person, provided the defendant was at the time committing a crime or a trespass. For example: The defendant, when about to discharge a gun unlawfully at a third person, is jostled just as the gun is fired, and the direction of the shot is changed so as to cause the plaintiff to be hit. This is a battery³.

Indeed in former times every blow which *resulted* from an intended act seems to have been looked upon as a battery⁴, in accordance with the general primitive idea, that if a man suffered harm at the hands of another, the latter must justify if he could. The modern authorities strongly tend to a different view. There is no *battery*, according to the modern view, unless the blow itself was intentional or reckless, or unless the defendant was otherwise conducting himself as a trespasser at the time⁵. No

Whether negligence can constitute a battery.

Plaintiff not the person intended.

Blow received accidentally by a person defending himself.

¹ Weaver *v.* Ward, Hob. 134. See Holmes *v.* Mather, L. R. 10 Ex. 261.

² See also Hall *v.* Fearnley, 3 Q. B. 919.

³ See James *v.* Campbell, 5 Car. & P. 372, where the defendant, in fighting with another, hit the plaintiff with his fist.

⁴ See Year Book 21 Hen. 7, 28; Lambert *v.* Bussey, T. Raym. 421; Weaver *v.* Ward, *supra*. Also Lex Aquilia, *infra*.

⁵ Coward *v.* Baddeley, 4 H. & N. 478, Martin, B., *infra*; Holmes *v.* Mather, L. R. 10 Ex. 261; Wakenan *v.* Robinson, 1 Bing. 213; Hall *v.* Fearnley, 3 Q. B. 919; Brown *v.* Kendall, 6 Cushing (Mass.), 292; Vincent *v.* Stinehour, 7 Vermont, 62; Nitroglycerine Case, 15 Wall. 524. See Spade *v.* Lynn R. Co., 172 Mass. 488; s. c. 168 Mass. 285. See also Pollock, Torts, p. 134, 6th ed. The old cases have fairly ceased to be law, both in England and in America.

man when doing that which is rightful should be held liable for consequences which he could not prevent by prudence or care, though another suffer bodily or other harm thereby. Such is the modern theory of civil liability¹. For example: The defendant's horse, upon which the defendant is lawfully riding in the highway, takes a sudden fright, runs away with his rider, and against all the efforts of the defendant to restrain him, runs against and hurts the plaintiff. This is not a battery or other breach of duty². Again: The defendant, walking near the plaintiff, suddenly turns round, and in so doing hits the plaintiff with his elbow. This is not a battery³.

Nor is there necessarily a right of action though (not merely the general action of the defendant, as in the last example, but) the specific act of contact be intentional, for it may have been done in sport or play; though sport could doubtless be carried to such an extreme as to create liability. It is not even a decisive test, always, to inquire whether the act was done against the plaintiff's will. The plaintiff may be engaged in criminal conduct at the time; or he may be lying, unconsciously, in an exposed condition; or with the best of intentions he may be doing that which the defendant rightly thinks dangerous to life or property. In the first of these cases, an arrest of the plaintiff by laying on of hands will be justifiable; in the second case, an arousing or removing of him will be proper; in the third, the laying on of hands to attract his attention is lawful⁴. In none of these cases is there liability, though the contact be against the will of the plaintiff⁵. If however the act were done in a *hostile* manner, the case would be different⁶.

¹ Stanley v. Powell, 1891, 1 Q. B. 86; post, chap. xix. But compare *Lex Aquilia*, fr. 45, § 4, the latter part of which is to the effect that if I throw a stone at a man assaulting me and hit some one else, I am liable.

² See *Vincent v. Stinehour*, 7 Vermont, 62, and example cited by Williams, C. J.; and see *Holmes v. Mather*, *supra*, a still stronger case.

³ A case put by Martin, B., on the argument in *Coward v. Baddeley*, 4 H. & N. 478. See *Brown v. Kendall*, 6 Cushing (Mass.), 292; *Holmes v. Mather*, *supra*; *Stanley v. Powell*, *supra*; *Holmes*, Common Law, 105, 106.

⁴ As to the last case, see *Coward v. Baddeley*, *supra*.

⁵ These however are properly cases of justification; the justification accompanies what otherwise would be actionable.

⁶ *Coward v. Baddeley*, *supra*.

A battery may be committed in an endeavour to take one's own property from the wrongful possession of another. If the party in possession should refuse to give up the property, the owner should resort to the courts to obtain it, or await an opportunity to get possession of it in a peaceful manner. Though entitled to take the property, he has no right to take it out of the hands of the possessor by unnecessary force. For example: The defendant, finding the plaintiff in wrongful possession of the former's horse, beats the plaintiff, after a demand and refusal to give up the animal, and wrests the horse from the plaintiff's possession. This is a battery¹.

§ 3. JUSTIFIABLE ASSAULT: SELF-DEFENCE: 'SON ASSAULT DEMESNE'

There are a few cases in which a man is entitled to take the law into his own hands and inflict corporal injury upon another.

Among these are to be noticed the right of a parent to give moderate correction to his minor child; the (probable) right of a guardian to do the like to a minor ward placed in his family; the right of a schoolmaster (when not prohibited by law or school ordinance) to do the like to his scholars²; the (possible) right of a master to do the like to young servants; and the right of officers of reform, discipline, or correction to do the like towards the refractory who have been committed to their charge. And so of injuries sustained in lawful sport, such as games of ball and physical contests generally; in such cases the defence resting on the ground of the lawfulness of the sport rather than of consent³.

Aside from these and similar cases, the right to do that which would otherwise amount to an assault or a battery is confined to two or three cases, all of which are justified on grounds either of self-defence or on

¹ *Andre v. Johnson*, 6 Blackford (Indiana), 375. But the defendant could of course keep his horse. *Scribner v. Beach*, 4 Denio (New York), 448, 451.

² See *Sheehan v. Sturges*, 53 Connecticut, 481; *Hathaway v. Rice*, 19 Vermont, 102; *Commonwealth v. Randall*, 4 Gray (Mass.), 36; *Fertich v. Michener*, 111 Indiana, 472.

³ Compare the Roman law as stated by Grueber, *Lex Aquilia*, pp. 226, 227.

the ground that the plaintiff really caused the act of which he complains. In the language of the old law the wrong complained of by the plaintiff was 'son assault demesne.' A person cannot be liable for an act which he himself has not committed or caused, either personally or by another authorized to act for him. Hence if the plaintiff himself caused the act complained of, the defendant cannot be liable to him for it.

The chief case to be noticed in which the justification of 'son assault demesne' is allowed is self-defence. Wherever it appears to have become necessary to the defendant's protection to repel force by force, he may do so¹. The right of self-defence extends to the use of physical force in the protection of property as well as of the person of the defendant, provided the property be at the time in the defendant's possession. No one has a right, except under authority of law, to seize upon the property of which the owner is in rightful possession; to do so is to take the risk of bodily violence. For example: The plaintiff, a creditor of the defendant, seizes the defendant's horses (which the latter is using) for the purpose of obtaining satisfaction of his debt. The defendant resists and strikes the plaintiff. He is not liable if he did not exceed the bounds of defence².

If the owner or person entitled to possession was out of possession at the time of committing the alleged assault or battery, he will not be permitted to say, by way of defence, that the plaintiff caused the assault by having previously taken wrongful possession, or by having wrongfully detained the defendant's

¹ *Drew v. Comstock*, 57 Michigan, 176; *Miller v. State*, 74 Indiana, 1. 'Vim vi repellere licere Cassius scribit idque ius natura comparatur.' Dig. 43, 16, 1, § 27. The difficulty is in determining when it appears to be necessary to do the thing complained of, and when one may strike or shoot without first 'retreating to the wall.' See *Howland v. Day*, 56 Vermont, 318. Retreat cannot be required where action upon the instant appears to be necessary for self-protection. See *Beard v. United States*, 158 U. S. 550. Compare the Roman law. 'Sed et si quemcumque alium ferro se petentem quis occiderit, non videbitur iniuria occidisse: et si metu quis mortis furem occiderit, non dubitabitur quin lege Aquilia non teneatur. Sin autem cum posset adprehendere, maluit occidere, magis est ut iniuria fecisse videatur: ergo et Cornelia [lege] tenebitur.' Dig. 9, 2, 5 pr. (i.e. *Lex Aquilia*, fr. 5 pr.); Grueber, *Lex Aq.*, pp. 9-11.

² See *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen, 308; s. c. 99 Mass. 317; *Scribner v. Beach*, 4 Denio (New York), 448.

property. Such is not a case of 'son assault demesne,' as the example already given of the horse taken from the plaintiff's possession by violence shows¹.

And though a trespasser should make an assault upon the owner of property, and seek to take it out of the owner's possession, the owner is allowed to use no greater force in resisting the unlawful act than may be necessary for the defence of his possession². If he should reply to the trespasser's attempt with a force out of proportion to the provocation, the act would then be, in the old law phrase, still true in legal effect, 'his own battery,' and not the plaintiff's; or again, in the technical language of the old pleading, the plaintiff's reply was, and still in effect is, that the tort was 'de injuria sua propria,'—the defendant's own wrong. For example: The defendant, owner of a rake which is in his own hands, knocks the plaintiff down with his fist, upon the plaintiff's taking hold of the rake to get possession of it. The defendant is liable³. Again: The defendant strikes the plaintiff repeated blows, knocking her down several times, upon her refusal to quit the defendant's house. The plaintiff is entitled to recover⁴.

Nor is it lawful for the owner of property, in defence of his possession, to make an attack upon the trespasser without first calling upon him to desist from his unlawful purpose, unless the trespasser is at the time exercising violence. In the example last given, the defendant would have been liable for a mere hostile touch had he not first requested the plaintiff to leave his premises; unless she had entered his premises forcibly⁵.

In the next place it is to be observed that a person may not only make reasonable defence of his own person, and of the possession of his own property; he may do the same towards the members of his own family when attacked⁶, and perhaps also towards the inmates of a house in which he is then receiving hospitality.

Reasonable
defence of
members of
one's family.

¹ Ante, p. 176.

² The allowable force in such a case was formerly expressed by the words (of pleading) 'molliter manus imposuit,'—the defendant gently laid his hands upon the plaintiff. Compare *Lex Aquilia*, fr. 52, § 1; Grueber, pp. 169, 170.

³ *Scribner v. Beach*, 4 Denio (New York), 448.

⁴ *Gregory v. Hill*, 8 T. R. 299.

⁵ See *Scribner v. Beach*, 4 Denio (New York), 448.

⁶ *Black. Com.* i. 429.

Certain it is that a servant may justify a battery as committed in defence of his master¹; that is, he may do anything in his master's defence which his master himself might do. And on the other hand, notwithstanding some doubts in the books, a master may justify a battery as committed in defence of his servant. For example: The plaintiff attacks the defendant's servant, whereupon the defendant assists his servant to the extent of repelling the attack, and no further. The defendant is not liable².

A person may also justify the use of a proper amount of physical force as rendered in quelling a riot or an **Quelling riot.** affray at the instance of a constable or other officer of the peace³, or perhaps of his own motion when no officer is present.

§ 4. VIOLENCE TO OR TOWARDS ONE'S SERVANTS

It will have been observed that a double breach of duty may be committed by the same assault or battery; one to the **Double breach of duty.** person to whom the violence is done, and, where such person is a servant or a child of the plaintiff, another breach to the person whom he or she was serving or assisting. It follows that each has a right of action against the wrongdoer in respect of the breach of his own individual right; the servant or child for the violence (that is, for the assault or battery) and its proper consequences, and the master or parent for the loss of service or assistance⁴.

There will be this difference however between the rights of

¹ Reeve, Domestic Rel. 538 (3rd ed.).

² Tickell v. Read, Loft, 215.

³ Year Book 19 Hen. 6, pp. 43, 56; Bigelow's L. C. Torts, 270.

⁴ The relation of parent and child is for such purpose the relation of master and servant. That of course is not true of the relation of husband and wife; but whether the husband alone could recover for a battery committed upon his wife without proving special damage, quære?

Quære of the master's right of action where the servant has been hurt, to the master's damage, in a case in which the servant had taken the risk, as in some physical contest? If the contest was lawful, the master could not recover, unless the hurt was inflicted wrongfully; this, not because of the servant's consent, but because the contest was lawful. See ante, p. 176. Compare Dig. 9, 2, 52, § 4; Dig. 9, 2, 7, § 4; Grueber, Lex Aquilia, pp. 226, 227. If the contest were unlawful, could the servant's consent bar the master's claim to damages?

action of the master and the servant (using these terms generically), that the latter will be entitled to recover judgment for the mere assault and battery, though no damage were actually inflicted; while the former will be entitled to judgment only in case he can prove either (1) that the violence committed was such as to disable the person who sustained it from rendering the amount of aid which he or she was able to render before the act complained of; or (2) that such person was, by reason of the violence, caused to depart from or abandon the service or abode of the plaintiff¹. That is, the master must have sustained an actual damage²; but if he has thus been injured, he is entitled to recover therefor, even though the defendant's act consisted only in violent demonstrations. For example: The defendants, by menaces and angry demonstrations against the plaintiff's servants, cause them to leave and abandon the plaintiff's service. The defendants are liable; though no bodily violence was committed upon the servants³.

**Distinction
between mas-
ter's action
and servant's.**

The plaintiff must either have been entitled to require the services of the party assaulted or beaten, or he must have been in the actual enjoyment of them, if they were gratuitous. A *parent* cannot maintain an action for an assault or a battery committed upon his child after the child's majority, unless he or she was then actually in the parent's service; nor could the parent maintain an action for such an injury committed upon his child during the child's minority, if the parent had in any way divested himself of the right to require his child's services⁴.

**Right to ser-
vice.**

¹ The authorities upon this subject are mostly ancient, but they are probably still law. See Bigelow's L. C. Torts, 226, 227.

² In the case of an assault or battery upon one's wife, the husband at common law joined in the action; but the real *right* of action lay in the wife. And in times of servitude the master could, it seems, sue in trespass for an assault or battery committed upon his villein, even though the former sustained no damage. Bigelow's L. C. Torts, 227.

³ Year Book 20 Hen. 7, p. 5; Bigelow's L. C. Torts, 226. These are cases of the use of wrongful *means*; they are to be distinguished from cases of persuasion. See ante, chaps. iv., v.

⁴ Questions of this sort have generally arisen in actions for seduction. See ante, pp. 124-126.

Some qualification of a master's right of action seems to be required when the loss of service caused by the assault was only an accidental or unexpected effect of the assault.

Contract.

Upon that idea it appears to have been laid down that if, in the course of performing a contract between the defendant and the plaintiff's servant, the defendant commit a battery upon the servant, which battery works incidentally a breach of the terms of the contract, the plaintiff has no right of action for the loss of service following. For example: The defendants, common carriers of passengers, are paid by the plaintiff's servant for safe passage from *X* to *Y*. On the way the servant is assaulted, bruised, and injured by servants acting for the defendants, the defendants thus failing to carry the servant safely according to their agreement; whereby the plaintiff loses the injured person's service for a period of nineteen weeks. The plaintiff is not entitled to recover; the injury being deemed to be due to breach of duty to the servant alone¹.

By the common law, rights of civil action for injuries done to the person (and indeed all rights of action *ex delicto*, except for the wrongful taking or detention of property and like acts²) cease with the death of the party

Death of parties.

¹ Compare *Alton v. Midland Ry.*, 19 C. B. N. S. 213; s. c. 15 Jur. N. S. 672; *Fairmount Ry. Co. v. Statler*, 54 Penn. St. 375. See *Taylor v. Manchester Ry. Co.*, 1895, 1 Q. B. 134, 140; *id.* 944; *Harvard Law Rev.*, Nov. 1895, p. 215; *post*, Negligence. The contract-duty (of service in the example) may or may not be the only duty created in the case. If I buy a gun for myself only, the contract-duty of the seller in regard to the proper making of the gun is to me alone. See *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387, 390. But if the seller understands that the rights of another are involved,—that another also is to use the gun,—then there is a duty to that person as well as to me. *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338, Exch. Ch. See also *Thomas v. Winchester*, 6 New York, 397. The real reason then for the decision in the example of the text appears to be, that the defendant did not know of the rights of any one but the servant. Duty imports observed or observable danger. *Ante*, p. 12.

² *Ante*, pp. 45, 46. See *Phillips v. Homfray*, 24 Ch. Div. 439; also the early statutes, 4 Edw. 3, c. 7, 25 Edw. 3, st. 5, c. 5, and the modern one, 3 & 4 Wm. 4, c. 42; *Pollock, Torts*, 65, 6th ed. And Lord Campbell's Act, 9 & 10 Vict. c. 93, gives a right of action to the personal representative 'for the benefit of the wife, husband, parent, and child of the person' killed. See *Seward v. The Vera Cruz*, 10 App. Cas. 59 (overruling *The Franconia*, 2 P. D. 163); *Pym v. Great Northern Ry. Co.*, 4 Best & S. 396, Ex. Ch.; *Bulmer v. Bulmer*, 25 Ch. D. 409.

injured or of the wrongdoer. 'Actio personalis moritur cum persona.' And this rule, though not without strong doubts, has been held to apply to actions by masters for the killing of their servants¹. The rule that the action dies with the death of either party permits however an action by the master for damages between the time of the injury of the servant and his death, where death was not immediate².

§ 5. FELONY

There is an old formula of the law that 'trespass is merged in felony'; and assault or battery is a trespass. But the meaning of this maxim is somewhat uncertain. The better view, however, so interprets it as materially to modify if not destroy its force in the natural sense of the language; for it has been considered to mean only this, that where the wrongful act amounts to felony, the injured party ought first, in duty to the public, to see that the cause is prosecuted criminally to conviction (or at least wait until that is done by some one) unless the failure can be excused. That condition performed, he may sue the offender; otherwise not³. But it is admittedly difficult to apply the rule, at least if it is considered to be the duty of the injured party to prosecute; for how could such a duty be enforced⁴?

¹ *Osborn v. Gillett*, L. R. 8 Ex. 88, Bramwell, B., dissenting strongly. See also *Pollock, Torts*, 60-64, 6th ed.

² *Baker v. Bolton*, 1 Camp. 493; *Osborn v. Gillett*, L. R. 8 Ex. 88, 90, 98. See also *Insurance Co. v. Brame*, 95 U. S. 754; *Harvard Law Rev.*, Dec. 1900, pp. 290, 291.

³ *Pollock, Torts*, 197-200, 6th ed. See *Ex parte Ball*, 10 Ch. Div. 667, 673; *Rooke v. D'Avigdor*, 10 Q. B. D. 412; *Wells v. Abrahams*, L. R. 7 Q. B. 554 (casting doubt upon *Wellock v. Constantine*, 2 H. & C. 146).

⁴ See *Wells v. Abrahams*, *supra*, at p. 563.

CHAPTER IX

FALSE IMPRISONMENT

Statement of the duty. *A* owes to *B* the duty not to impose a total restraint upon *B*'s freedom of locomotion.

The terms 'writ,' 'warrant,' 'precept,' and 'process' are, in this chapter, used as equivalents, wherever it is not necessary to distinguish them.

The term 'irregular,' as applied to a writ, refers to some improper practice on the part of the person who obtains the writ, as distinguished from 'error,' in decision¹. A writ is sometimes absolutely void for irregularity², sometimes only voidable.

Since 1869 arrest in civil suits has been prohibited, except in a few special cases³, so that the particular facts of many of the older authorities no longer appear; but the principles upon which they rested have not been changed.

§ 1. NATURE OF THE RESTRAINT: WHAT MUST BE PROVED, ETC.

A false imprisonment consists in the total, or substantially total, restraint of a man's freedom of locomotion⁴. Proof of such

Definition. restraint will make a prima facie case. The act may be committed not only by placing a man within

¹ See *Everett v. Henderson*, 146 Mass. 89.

² As a writ in execution of a judgment which has been discharged to the knowledge of the person suing out the same. *Deyo v. Van Valkenburgh*, 5 Hill (New York), 242.

³ 32 & 33 Vict. c. 62, § 4.

⁴ *Bird v. Jones*, 7 Q. B. 742, 752

prison walls, but also by restraint imposed upon him in his own house or room, or in the highway, or even in an open field¹.

Any general restraint is sufficient to constitute an imprisonment; and though this be effected without actual contact of

Contact. the person, it will be presumptively actionable.

Any demonstration of physical power which, to all appearance, can be avoided only by submission, operates as effectually to constitute an imprisonment, if submitted to, as if any amount of force had been exercised. For example: The defendant, an officer, says to the plaintiff, 'I want you to go along with me,' with a show of authority, or of determination to compel the plaintiff to go. This is an imprisonment, though the defendant do not touch the plaintiff².

A person may also be imprisoned, though he had not the full power of locomotion before the restraint was imposed. It

Power of movement. appears to be sufficient if his will has been so overcome that he would not attempt to escape the

restraint if he had the physical ability of locomotion. For example: The defendant, a creditor of the plaintiff, goes with an officer to the plaintiff's house, in order to compel him to give security for or make payment of his debt, which is not due. The plaintiff is found sick in bed; whereupon the officer tells him that they have not come to take him, but to get a certain article of property belonging to the plaintiff, though, if he will not deliver that or give security, they must take him or leave some one in charge of him. The plaintiff, much alarmed, gives up the article. This is an imprisonment³.

The submission therefore to the threatened and reasonably apprehended use of force is not to be considered as a consent to the restraint, within a maxim which has frequent application in the law of torts, 'volenti non fit injuria.' And the imprisonment continues until the party is allowed to depart, and is involuntary until all general restraint ceases, and the means of effecting it are removed⁴.

¹ Lib. Ass. (22 Edw. 3), p. 104, pl. 85.

² *Brushaber v. Stegemann*, 22 Michigan, 266, 268. See *Hill v. Taylor*, 50 Michigan, 549.

³ *Granger v. Hill*, 4 Bing. N. c. 212.

⁴ *Johnson v. Tompkins*, Baldwin (U. S. Federal Court), 571, 602.

It is not enough that restraint is imposed upon one's freedom of proceeding in a particular, desired direction. The detention must be such as to cause escape in any direction **Circumscribing restraint.** to amount to a breach of the restraint; the restraint should be circumscribing, except perhaps where the only place of escape is an almost impassable one. For example: The defendant, an officer, stationed at a particular point to prevent persons from passing in a certain direction, restrains the plaintiff from passing that way, but leaves another way open to him, of which however he does not wish to avail himself; and thus detained the plaintiff stands there for some time. This is not an imprisonment¹.

It follows from the last proposition, and from what had been stated before, that a person detained within walls is none the less imprisoned by reason of the fact that he may **Prison walls not necessary.** make an escape through an unfastened window or door; since such an act would be a breach of the restraint. If it would not be, there is no imprisonment; supposing that the unfastened door or window affords a ready means of escape.

§ 2. JUSTIFICATION: ARRESTS WITH WARRANT

Supposing the restraint imposed to amount to an imprisonment, it is proper next to consider how the presumptive right of action for such an act can be overturned. How is **Justifiable arrests.** it to be shown that the imprisonment was not unlawful? In other words, how is the act, in technical language, to be justified? This may be done in several ways, all of which however will be passed over except such as relate to the administration of justice. Of justifications of that kind the most common and the most important arises where an officer has made an arrest under a lawful warrant of a court of justice. This will

¹ Bird v. Jones, 7 Q. B. 742. 'A prison may have its boundary large or narrow, invisible or tangible, actual or real, or indeed in conception only; it may in itself be movable or fixed; but a boundary it must have, and from that boundary the party imprisoned must be prevented from escaping; he must be prevented from leaving that place within the limit of which the party imprisoned could be confined.' Id. Coleridge, J.

now be taken for special consideration. Arrests *without* warrant by officers or by private citizens will follow in a distinct section.

It is to be observed at the outset that the officer, in executing his process, must arrest the person named in it. If he do **Arrest of wrong person.** not, though the arrest of the wrong person was made through mere mistake, it may be a case of false imprisonment. And this appears to be true, though the party arrested bear the same name as the party against whom the writ is directed. For example: The defendant, a constable, asks the plaintiff if his name is *J. D.*, to which the plaintiff replies in the affirmative; whereupon the defendant takes the plaintiff into custody, the plaintiff not being the person intended by the writ. This is a case of false imprisonment¹.

If however the plaintiff, though not the person intended by the process, should do anything to mislead the officer, and cause the latter to believe that the former was the person meant by the precept, the officer commits no breach of duty in making the arrest. The plaintiff's action is a consent, and something more. For example: The defendant, a sheriff, arrests the plaintiff under process of court, upon a representation made by her that she was *E. M. D.*, and the person against whom the writ had issued, with the intention of procuring the defendant to arrest her under his writ. The defendant, believing the representation to be true, makes the arrest. This is not a breach of duty².

The officer's process however should so describe the person to be arrested that he may know whom to arrest; or, rather, **Description of person.** that a person whom he proposes to arrest may know whether to resist or submit. If the warrant be defective in this particular, the officer acts at his peril in serving it; and he will be liable to any one whom he may arrest under it. For example: The defendant, a constable, arrests the

¹ *Coote v. Lighworth*, F. Moore, 457. It is to be noticed that the plaintiff in this case did nothing to induce the officer to arrest him as the person intended.

² *Dunston v. Paterson*, 2 C. B. N. s. 495. The sheriff however had detained the plaintiff improperly after discovering his mistake, and for this he was held liable.

plaintiff under a warrant reciting the commission of a felony by *John R. M.*, and then commanding the officer to arrest the said *William M.* The defendant is liable for false imprisonment, though the plaintiff is the person intended¹.

It follows that the officer may be liable if there be a misnomer in the warrant of the person intended, though the person actually meant was arrested, and that too (in other respects) on legal grounds. For example: The defendants cause the plaintiff, whose name is *Eveline*, to be arrested under the name of *Emeline* in the warrant. This is a breach of duty, though the plaintiff, in her proper name, was legally liable to such an arrest². But the case would have been different had the plaintiff been known alike by either name³.

The officer also loses the protection of his warrant if he fails to act in accordance with the duty enjoined by it. He must follow the tenor of his process, and not surpass his authority. For example: The defendant arrests the plaintiff beyond the precincts named in the warrant. This is a false imprisonment⁴.

It is further to be noticed that, though the process and arrest be valid, the protection of the officer may be lost by oppressive or cruel conduct. For example: The defendant, charged with a warrant simply to take the body of the plaintiff, unites with the person at whose instance the arrest is made in illegally extorting money from the plaintiff by working upon his fears. The defendant is liable for a false imprisonment⁵.

The officer's protection will not extend to any detention after the warrant has expired. The warrant, however valid at first,

¹ *Miller v. Foley*, 28 Barbour (New York), 630.

² *Scott v. Ely*, 4 Wendell (New York), 555.

³ *Griswold v. Sedgwick*, 1 Wendell (New York), 126.

⁴ This is too fundamental to have been much agitated in the courts. No authority is needed for the example.

⁵ *Holley v. Mix*, 3 Wendell (New York), 350. In such a case the process appears to be used as a mere subterfuge to cover an unlawful purpose and act. Hence it is that not merely the subsequent act but the arrest itself is unlawful. See post, chap. x. § 3, *Trespass ab initio*.

will not justify such an act. If the officer has reason for holding the prisoner after the expiration of the warrant, he must procure new process. He can hold the prisoner only for a reasonable time before his examination; after that time the warrant loses its life. For example: The defendant arrests the plaintiff, and takes him before a magistrate on a charge of larceny, detaining him for a period of three days, in order that the party whose goods had been stolen might have an opportunity to collect his witnesses and prove the crime. This is a false imprisonment, the detention being unreasonable¹.

When an arrest has been made upon a valid warrant, the officer may detain the prisoner on any number of other valid warrants which he has at the time, or which may afterwards, during the detention, reach him. But if the officer make the arrest on void process, or in an otherwise illegal manner, he has no right to detain the party on any valid process which may be in his hands; for the officer, upon a principle elsewhere stated, cannot avail himself of a custody effected by illegal means to execute valid process². The prisoner should first be permitted to go at large, and then arrested under the valid warrant. For example: The defendant improperly arrests the plaintiff without a warrant, and while holding him in custody delivers him to an officer. The defendant afterwards receives a valid warrant for the plaintiff's arrest from an officer who held it at the time of the arrest. The plaintiff has a right of action for a false imprisonment³.

The principle to be derived from the cases (to restate this important doctrine in the language of the courts) is then that where the officer legally arrests the party in one action, the arrest operates virtually as an arrest in all the actions in which the officer holds valid writs against him at the time: for it would be an idle ceremony to arrest the party in the other cases. And this detainer will hold good, though the court may, upon collateral grounds, unconnected with the act of the officer, order the party to be discharged from the first arrest. But where the

¹ Wright v. Court, 4 B. & C. 596. The prisoner should have been taken before a magistrate at once.

² Hooper v. Lane, 6 H. L. Cas. 443.

³ Barratt v. Price, 9 Bing. 566.

officer has illegally arrested the party, he is not in custody under the first warrant, but is suffering a false imprisonment; and such false imprisonment, being no arrest in the original action, cannot operate as an arrest under the other warrants in the officer's hands¹.

It is important, in the next place, to inquire into the right of an officer to retake a prisoner under the original warrant, after an escape. It is clear that if the escape was
Recapture. made without the consent of the officer, while the writ was still in force, that is, not fully executed, the prisoner may be retaken on the old warrant, without rendering the officer liable to an action for false imprisonment. In case of an escape permitted by the officer, his right of retaking on the old writ will depend on the nature of the case. When, in civil cases, an arrest is proper, an officer who has arrested a man may, it seems, retake him before the return of the process, though he voluntarily permitted him to escape immediately after the arrest. So at all events it was held under the old law. For example: The defendant arrests the plaintiff in civil process, and on the following day releases him upon the latter's request. Two days afterwards the defendant rearrests the plaintiff on the old process and commits him to gaol, where he remains until he gives bail; the old process not being yet returnable (that is, being still in force). This is not a breach of duty on the part of the officer².

In regard to criminal cases, there has been some conflict of authority concerning the right to take the prisoner without new process. It has sometimes been decided that the prisoner may be so retaken³. In later decisions, this doctrine has been denied to be law, except in so far as it may apply to the case of a prisoner who, after escape from gaol⁴, has returned and given himself into

¹ Tindal, C. J., in *Barratt v. Price*, and Williams, J., in *Hooper v. Lane*, *supra*.

² *Atkinson v. Matteson*, 2 T. R. 172.

³ *Clark v. Cleveland*, 6 Hill (New York), 344. In this case the prisoner had been let to bail in the wrong county, and then released from custody; and, in an action by him for malicious prosecution, it was held that the plaintiff was still liable to arrest under the original warrant, and that therefore, the proceedings not being terminated, the action could not be maintained.

⁴ That is, after the warrant had been executed.

the custody of the officer; in that case the prisoner can be detained under the old warrant. And this appears to be the true rule and distinction. For example: The defendant, an officer of the peace, clothed with a warrant to arrest the plaintiff upon a charge of larceny, executes the same upon her, and takes her before a justice of the peace, who receives her recognizance to appear for trial at another court upon a certain day. She is then discharged from arrest. No court is held at the place and time stated. Afterwards the defendant rearrests her upon the old warrant, and takes her before another magistrate. This is a false imprisonment¹.

An arrest made under a void writ will generally render the officer, as has already been stated, liable to an action for false imprisonment. But in order to subject him to such liability, the writ must have been void on its face; that is, of no more validity than waste-paper. If it be voidable merely, or if, though void, the fact does not appear on the face of the process, especially if the officer does not know that the process is void, it will afford a protection to the person who serves it².

Now a writ will be void on its face (1) if it be materially defective in language; an example of which defect is void. may be seen in the case above stated, where the writ failed to show who was intended.

A writ will be void on its face (2) if the whole proceeding in which it was issued was beyond the jurisdiction of the court granting it. For example: The defendant executes a warrant against the plaintiff for the collection of road taxes; the warrant being issued by a justice of the peace who has no authority over such taxes. The writ is void, and the defendant is liable for false imprisonment³.

A writ will be void on its face (3) where the court, though having jurisdiction over the subject-matter of a proceeding, has no authority to institute suit by a warrant. For example: The defendant, an officer, executes a warrant for the arrest of the

¹ *Doyle v. Russell*, 30 Barbour (New York), 300.

² *Tarlton v. Fisher*, 2 Doug. 671; *Deyo v. Van Valkenburgh*, 5 Hill (New York), 242.

³ *Stephens v. Wilkins*, 6 Barr (Pennsylvania), 260.

plaintiff in a complaint for the non-payment of wages. The court issuing the writ has jurisdiction over such cases, but has no power to issue a warrant; a summons being the only process allowed. The writ is void, and the defendant is liable¹.

In such cases, the writ showing its invalidity upon its face, the officer is not bound to serve the process. The effect of the second and third of these rules is to require the **Officers must know the general jurisdiction of the court.** officer to know the general extent of the jurisdiction of the court which he is serving. Further than this the law does not go; and in other cases the officer will be protected, though his writ, being voidable, is liable to be set aside for error, or even though it is actually void. Cases of this kind are always within the limits of the court's general jurisdiction; and the officer is not liable, since, though bound to know the extent of the court's jurisdiction, he is not presumed to know the nature and propriety of all the proceedings in a cause. If the officer does in fact know that the court has no jurisdiction, then, by some authorities, the process is deemed to be void on its face²; but the better rule is, that an officer should not be permitted to refuse to serve process because merely of his own knowledge—or interpretation of facts, for that is what it would come to. Hence he should not be liable³ for serving the process in such a case³.

If the writ does not indicate its invalidity on its face, the officer is ordinarily safe, though the writ ought not to have issued.

To put the case in the form of a more general proposition, as laid down upon great consideration, a ministerial officer is protected in the execution of process, whether the **Process within the general jurisdiction of the court, but invalid in fact.** same issues from a court of limited or of general jurisdiction, though such court have not in fact authority in the particular instance, provided that on the face of the process it appears that the court has jurisdiction of the subject-matter, and nothing appears therein to apprise the officer that the court has not authority to order the arrest of the party named in the process. For example: The

¹ *Shergold v. Holloway*, 2 Strange, 1002.

² *Tellefsen v. Fee*, 168 Mass. 188, Knowlton, J., dissenting.

³ *Wilmarth v. Burt*, 7 Metcalf (Mass.), 257, 260, 261, Shaw, C. J.; *Tierney v. Frazier*, 57 Texas, 437, 440, 441; also cases cited in *Tellefsen v. Fee*, *supra*.

defendant, a constable, arrests the plaintiff under a warrant from a justice of the peace issued upon a judgment against the plaintiff in an action within the jurisdiction of the court. The court has authority in such cases to issue a warrant, but in this particular instance the suit has not been instituted by the issuance of the necessary process for the appearance of the then defendant, now plaintiff. The defendant has violated no duty to the plaintiff, and is not liable, though the court had no authority to issue the warrant under such circumstances, the process not indicating the fact¹. Again: The defendant, an officer, arrests the plaintiff, a member of Parliament, privileged at the time from arrest, the writ not indicating the fact. This is not a false imprisonment².

The clerk of the court will also probably, like the officer who serves the precept, be liable in case he made out the writ in a defective form. He has done that which he has
When the clerk is liable. no right to do, and is therefore forbidden to do; and he must accordingly stand upon the same footing with the officer.

The clerk may also be liable when the officer who serves the writ is not liable. And this will be the case whenever the writ, though regular on its face (and hence a justification to the officer), was issued without orders of the court, under circumstances in which such issuance is not by law allowed. For example: The defendant, clerk of an inferior court, issues a writ of *capias* on which the plaintiff is arrested, without the presence or intervention of the court, upon a default of the plaintiff, as to the granting of which the law requires that the judge should exercise certain judicial functions. The defendant is guilty of a breach of duty, and is liable to the plaintiff; and this too though he only conformed to the usual practice of the court in such cases, since a court cannot delegate its judicial functions³.

The clerk will also (probably) be liable, like both the officer and the judge, when the writ, issued by order of the court, shows upon its face that the whole cause was without the jurisdiction of the judge. It will be different however if, while the proceed-

¹ *Savacol v. Boughton*, 5 Wendall (New York), 170.

² *Tarlton v. Fisher*, 2 Doug. 671.

³ *Andrews v. Marris*, 1 Q. B. 3.

ing was within the jurisdiction of the court, the particular act merely, commanded by the court, was in excess of its jurisdiction, without the clerk's knowledge. The clerk is merely a ministerial officer, like the sheriff or constable, and is no more bound than such officer to know of the legality of orders of the court within its jurisdiction. For example: The defendant, clerk of a county court, by order of the judge signs and seals a warrant for the arrest and imprisonment of the plaintiff for a period of thirty days, after a certain date, upon failure to conform to an order of court: when the order of commitment should have required an earlier arrest. The defendant is not liable, though the judge (as will be seen) would be¹.

The judge of an inferior court, if he authorizes the arrest, is liable whenever the officer, acting in strict accordance with his precept, is liable; provided the precept be not void **When the judge is liable.** for defective language. As the judge does not make out the writ, he cannot be liable for such defect; and the clerk is not his agent or servant². In other cases, that is when the court has not jurisdiction of the cause, the proceeding is *coram non iudice*; the court loses its judicial function, and the judge becomes a mere private citizen³.

More than this, the judge may be liable when the officer is not. This will be true whenever the judge has plainly exceeded his jurisdiction, though in a matter not affecting the officer. For example: The defendant, a justice of the peace, fines the plaintiff under the game laws, as he may do, and then sends him to gaol without any attempt to levy the penalty upon his goods, which he has no right to do. He is liable for false imprisonment; though the officer who executes the writ is not⁴.

¹ *Dews v. Riley*, 11 C. B. 434.

² *Carratt v. Morley*, 1 Q. B. 18.

³ *The Marshalsea*, 10 Coke, 68 b; s. c. *Bigelow's L. C. Torts*, 278, note.

⁴ *Hill v. Bateman*, 2 Strange, 710. The arrest was justifiable, so far as the sheriff was concerned, because, though in the particular instance unauthorized, it was still within the power of the justice to grant such a writ in a proper case; that is, after an ineffectual attempt to levy the penalty upon the party's goods. The officer was not bound to know whether such an attempt had been made. Possibly he might be thought liable had he known that no such attempt had been made; and this knowledge might perhaps have been easily proved. The cases are conflicting. See ante, p. 191.

When the question of the court's jurisdiction turns on matter of fact, it is laid down as well-settled that a judge of a court of record with limited jurisdiction, or a justice of the peace acting judicially with special and limited authority, is not liable to an action of trespass (of which the action for false imprisonment is an example) for acting without jurisdiction, unless he had the knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction¹. And it lies upon the plaintiff in every case to prove the fact². For example: The defendant, a justice of the peace, having jurisdiction to grant a *capias* in certain classes of civil offences committed within his district, orders the arrest of the plaintiff, on suit brought against him by a third person, for an offence committed without his district. The defendant however has no knowledge that the act was committed beyond his district, nor is he put upon notice of the fact by anything arising before the arrest. He is not liable for a false imprisonment³, unless he acted maliciously and without probable cause⁴.

When however the question of jurisdiction does not depend upon the proof of certain facts, but upon a question of plain law, the judge granting the writ⁵ acts at his peril; and then if he order the arrest of an individual when he has no jurisdiction, not determinable on facts, he will be liable for false imprisonment. For example: The defendant, judge of a court of record of limited jurisdiction, directs the arrest of the plaintiff for contempt of the process of the court, and commits him to gaol. The commitment is unauthorized, and is made under a mistake of plain law about the powers of the defendant, and not under

¹ *Calder v. Halket*, 3 Moore, P. C. 28, Parke, B.; *Pease v. Chaytor*, 32 L. J. Mag. Cas. 121, Blackburn, J.

² *Calder v. Halket* and *Pease v. Chaytor*, *supra*, in which *Carratt v. Morley*, 1 Q. B. 18, apparently *contra*, is doubted.

³ See *Pease v. Chaytor*, *supra*, opinion of Blackburn, J., at pp. 125, 126, from which this example is framed. Another example may be seen in *Lowther v. Radnor*, 8 East, 113, 119. A distinction must however be noticed (which was pointed out in *Pease v. Chaytor*) between a proceeding to prevent the enforcement of a judgment in such a case—that would be proper—and an action against the judge of the court, as in the example.

⁴ *Id.* In such a case, the suit would properly be an action for malicious prosecution.

⁵ That is, the magistrate originally acting; not, it seems, a superior judge to whom the case may have been taken.

mistake as to the facts; the statute requiring that the process (under the circumstances) should have been issued by the court of another county. The defendant is liable¹.

From the statement of the foregoing principles and examples, it will be seen (1) that the officer alone may be liable for false imprisonment; as where he executes his writ upon
Summary. the wrong person, without the latter's fault: (2) that the clerk alone may be liable; as where, without direction from the judge, he issues a precept regular in form, and within the jurisdiction of the court, but which he had no right at all to issue: (3) that the judge alone may be liable; as where, having jurisdiction over the cause, he orders the issuance of the warrant under circumstances in which the act was improper: (4) that the officer and the clerk may be liable; as where the writ contains substantially defective language: (5) that all three may be liable; as where the whole cause, in the course of which the writ is issued (at the command of the judge), is without the jurisdiction of the court.

This is not all. The liability for a false imprisonment may extend to the attorney at whose instance the proceeding was begun, and, further still, to his client who authorized him to begin it. Indeed, this will always be the case wherever it can be properly said that the wrongful imprisonment was ordered or participated in by the client. But of this, further below.

When the judge assumes the power of ordering the warrant, upon a statement of the grounds, the act (with the exception to be stated presently) is his own, and not the attorney's or his client's²; the attorney or client has set not a ministerial but a judicial officer in motion³. If this be the extent of the connection of the attorney and client with the arrest, neither can be

¹ *Houlden v. Smith*, 14 Q. B. 841.

² *Cooper v. Harding*, 7 Q. B. 928; *Williams v. Smith*, 14 C. B. N. S. 596; *Smith v. Sydney*, L. R. 5 Q. B. 203.

³ In this appears a clear distinction between an action for false imprisonment and one for malicious prosecution. 'The party making the charge [before a magistrate] is not liable in an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and the judgment of a judicial officer are interposed between the charge and the imprisonment.' *Austin v. Dowling*, L. R. 5 C. P. 534, 540, Willes, J.

liable, whether the writ was granted upon a mistaken view of the case by the judge in regard to his jurisdiction (in which case *he* might be liable), or was issued in a materially defective form (in which case the clerk and the officer would be liable); the act is that of another. Illustrations may be seen in the examples above given. Hence the attorney and client may not be liable, though the process was void on its face¹.

It is laid down however that when the warrant was issued under false representations, or even through mistake of counsel or client, the act is not the act of the judge, unless he had no jurisdiction to grant the process, but of the attorney, and of his client whom he represents². The consequence is, that both are liable for false imprisonment upon the execution of the warrant, even though they take no further steps in the matter than those involved in obtaining the same. For example: The defendants, attorney and client in a former suit against the present plaintiff, obtain a warrant therein for the latter's arrest upon material misrepresentations made in an affidavit upon which the warrant is awarded, on account of which misrepresentations the warrant is, after the plaintiff's arrest, set aside. They are both liable³. Again: The defendant, by his attorney, in a former suit against the now plaintiff, procures the arrest therein of the last named under a writ issued by mistake against a person not bearing the name of the present plaintiff. This is

¹ *Carratt v. Morley*, 1 Q. B. 18. The author withdraws his criticism on this case, made in his *Leading Cases on Torts*, p. 280. The client had done nothing but to ask for a writ; and the court, acting judicially, granted it. The act was therefore the act of the judge, and not of the party. The latter, to be liable, must either have directed the execution of the writ after its issuance, or have obtained it from the court in an irregular manner, or have participated in the execution of it.

² *Williams v. Smith*, 14 C. B. N. S. 596; *Codrington v. Lloyd*, 8 Ad. & E. 449; *Collett v. Foster*, 2 Hurl. & N. 356. See *Davies v. Jenkins*, 11 M. & W. 745. This has been doubted where the false allegations were the foundation of a suit, and not merely collateral to it. That would appear to be a sound limitation to the rule. See *Everett v. Henderson*, 146 Mass. 89. The court say that irregularities 'do not include false allegations of fact made as a foundation for a suit in which the allegations are to be proved or disproved. And,' it is added, 'this is equally true whether they are falsely made by mistake or by design.' See the same case on the distinction between an action for false imprisonment and an action for malicious prosecution under such circumstances.

³ *Williams v. Smith*, 14 C. B. N. S. 596. The action was not sustained in this second suit, because the misrepresentations were not material.

a false imprisonment, and the defendant is liable, although the person intended was arrested¹. Again: The defendants, attorney and client in a former civil action against the now plaintiff, in which they obtained judgment against him, obtain a warrant for the arrest of the plaintiff by virtue of the judgment, after a discharge therefrom of the plaintiff by proceedings in insolvency, of which the defendants had notice. They are liable for false imprisonment; unless it can be shown that the discharge was obtained by fraud².

The attorney, and his client with him, may, in other cases also, become liable where the arrest has been ordered by the judge. Such a result will come about whenever the attorney participates in any manner in effecting the arrest after the issuance of the improper warrant. For example: The defendants, attorney and client in a former litigation against the present plaintiff, having obtained an erroneous warrant against the latter from the judge, the attorney personally puts the precept into the officer's hands, and directs him to serve it. The defendants are both liable; the attorney because of his personal interference, the client because bound by the act of his attorney in the ordinary course of the litigation³. Again: The defendant, an attorney, indorses with his name and residence an invalid warrant, issued against the plaintiff. This makes him a participant in the false imprisonment which follows⁴; and his client also.

It will thus be seen that there may be cases in which all the parties named will be jointly liable, client, attorney, officer, clerk, and judge. Such will be the result where the attorney personally directs the officer to serve

Summary.

¹ See *Jarman v. Hooper*, 6 Man. & G. 827.

² *Deyo v. Van Valkenburgh*, 5 Hill (New York), 242. This is the exception alluded to above, by which the attorney and client are liable, though the judge has been merely asked to grant the warrant. But it was misconduct to ask for the warrant when it was known that the judgment had been discharged, unless proof could be brought that the discharge was fraudulent. The judge, having no jurisdiction to grant the warrant in such a case, would also be liable, it seems.

³ *Barker v. Braham*, 2 W. Black. 866.

⁴ *Green v. Elgie*, 5 Q. B. 99.

a writ upon the plaintiff, issued by the judge's order, in a civil cause, wholly beyond the jurisdiction of his court.

A certain fundamental difference between civil and criminal cases should be noticed. The parties are different; a civil suit is a litigation between individuals; a criminal suit is a litigation between the public and an individual. The prosecutor in a criminal action does not represent the plaintiff in a civil suit. A civil proceeding is instituted in the interest and for the benefit of the plaintiff, and is under his control throughout; the plaintiff is 'dominus litis.' False steps and misconduct on his behalf in the course of the litigation will therefore bind him, as has already been seen. The prosecutor of crime however is not a party to the litigation instituted by him. The proceeding is not carried on primarily in his interest: and he has no control over its course. The consequence is, he cannot be bound by the action of the prosecuting counsel. He may however bind himself, and become liable for a false imprisonment by acts of his own, or of counsel whom he may employ to assist the prosecuting counsel. If the prosecutor or his own counsel should personally direct the service of invalid process, whether void or only voidable, he would be liable to the party arrested¹.

Before an action for false imprisonment under process of court can be maintained, it is necessary that the process should be set aside, unless it appear to be absolutely void. For if the process be merely voidable, it is valid until quashed; and hence the arrest must, till then, be legal. If however the process be absolutely void, and the action be brought against the proper party or parties, it is not necessary (probably), either in cases of civil or of criminal arrest, to have it set aside before suing for false imprisonment. For example: The defendant procures the arrest of the plaintiff on a warrant issued upon a judgment which the former knows to have been discharged; and the plaintiff sues for false imprisonment without first having the process set aside. The action is maintainable; the process being absolutely void². Again:

Process should be set aside unless void.

¹ Hopkins v. Crowe, 4 Ad. & E. 774.

² Deyo v. Van Valkenburgh, 5 Hill (New York), 242.

The defendant, a justice of the peace, procures the arrest of the plaintiff upon four convictions before him of baking bread on one and the same Sunday; the law permitting but one conviction in such a case. The defendant is liable for false imprisonment, though the wrongful convictions be not first quashed¹.

In both civil and criminal cases however the action for false imprisonment is to be distinguished from a suit for malicious prosecution. The process under which an imprisonment was made may have been, as regards the party or parties sued for the tort, either void or voidable²; and, in such a case, the action is maintainable without proof of malice, or of want of probable cause, or of the termination of the prosecution. In an action for malicious prosecution however it matters not whether the writ was void, voidable, or valid; the suit is for an unlawful prosecution, and to make such a case the plaintiff must prove the set of facts just stated.

**Malicious
prosecution
distinguished.**

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§ 3. ARRESTS WITHOUT WARRANT

It is not necessary however, in all cases, that an arrest for an infraction of the law should be made under authority and by command of a warrant. There are occasions on which the utmost promptness of action is required for the attainment of the ends of justice in the apprehension of law-breakers; and the necessities of society have in such cases furnished a justification for the arrest of offenders without a formal warrant of a court of justice. But the law does not encourage the making of arrests in this manner; on the contrary, in the interest of liberty, it prefers a slower and more deliberate proceeding by warrant, issued upon

**Occasions for
acting with-
out process.**

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¹ *Crepps v. Durden*, 2 Cowp. 640. In this case there was no arrest, but merely a levy on the plaintiff's goods for the amount of the penalty; but the principle would be the same.

² It will be noticed that to sustain an action against the officer who served the writ, or against the clerk, the writ must have been void on its face; while it is enough in *this* respect, to sustain an action against the judge or attorney and client, that the writ was only voidable.

solemn oath concerning the facts, in all cases in which the administration of justice can thus be efficiently carried out.

The occasions on which arrests without a warrant are considered justifiable upon the above-stated ground are well defined. In the first place, it must be well understood that the right to make such arrests is confined altogether to infractions of the criminal law. In no case can an officer make an arrest in a civil cause without the protection of a warrant. It may be true, as has already been stated, that, in cases of the release of a prisoner arrested on process in a civil action, the officer may retake the party without obtaining a special warrant for this particular purpose; but that is because he has already a warrant, which is still in force. Hence, the officer does make the arrest under a writ; and he must justify his act under that writ.

The first case to be mentioned in which an arrest can be made without a warrant, is when the arrest is made upon the spot, at the time of the breach of the peace. Such
Arrest on the spot. a case comes directly within the reason above mentioned, namely the necessities of society; nor could there be any use of requiring an affidavit and warrant in such a case, even if the delay might not be fatal. The right thus to arrest on the spot applies equally to all breaches of the peace, whether the act be a crime or a misdemeanour.

An arrest without warrant may also be made by an officer of the law, qualified for the making of arrests, upon ‘suspicion of felony,’ to use a common expression of the
On suspicion: probable cause. books. The meaning of this is, that if in an action for false imprisonment, without warrant (that is, *because* without warrant), the officer can show that, though no felony was in fact committed, he had *probable cause* to suppose that the prisoner had committed such a crime, he has violated no duty to the plaintiff in thus making the arrest. For example: The defendant, a constable, having probable cause to believe that the plaintiff is guilty of the felony of receiving or aiding in the concealment of stolen goods, arrests him without a warrant, and conveys him to gaol, where he detains the prisoner until he can make application to a magistrate for a warrant against him as a receiver of stolen goods. The

warrant is refused, and the prisoner at once discharged. The defendant is not liable¹.

In these cases, since the officer has no warrant to justify him, he has to show probable cause for the arrest. The officer's action is not a setting in motion of the courts, as it is in a prosecution by a prosecutor or plaintiff; hence the difference, in regard to proving probable cause, between a suit for false imprisonment and one for malicious prosecution.

The officer's 'suspicion' must of course, as above intimated, be a reasonable ground to suppose the prisoner guilty of a felony; that is, it must be such a strong suspicion as would justify a man of caution in entertaining a belief of the party's guilt. If the circumstances do not warrant such a belief, even though in fact a felony has been committed, the officer violates his duty to the plaintiff by arresting him without process of court². For example: The defendant, a constable, arrests and imprisons the plaintiff, without process, under the following circumstances: The cart of the plaintiff, a butcher, is passing along the highway, when a person in the habit of attending fairs stops the cart and says to the officer (defendant), 'These are my traces, which were stolen at the peace-rejoicing last year.' The defendant asks the plaintiff how he came by the traces. The plaintiff replies that he saw a stranger pick them up in the road, and bought them of him for a shilling; whereupon he is taken into custody, and, on examination before a magistrate, discharged. This does not show probable cause for the arrest, and the defendant is liable³.

In the authority from which this example is taken the whole case was given to the judges, with power to act as a jury

Who decides probable cause.	so far as might be necessary for the decision of the question before them. It therefore does not appear from the decision whether the question of
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¹ Rohan v. Sawin, 5 Cushing (Mass.), 281. Note that the magistrate's subsequent action has no bearing on the officer's justification of probable cause.

² Process would justify the officer in such a case; although the granting of it falls short of a judicial finding that there exists probable cause to believe the party guilty,—upon which, if there were such a finding, the officer might in principle be justified in acting even if he were not bound to act. But acting without process, the officer has to prove probable cause. The term 'probable cause' here, as in the chapter on Malicious Prosecution, is used for 'reasonable and probable cause.'

³ Hogg v. Ward, 3 H. & N. 417.

probable cause is to be considered as a question for the judge or for the jury; and the point was expressly left undecided by the judges.

The question has indeed been one of some difficulty. In some of the cases it has been tacitly assumed that the jury must determine whether the officer had probable cause for taking the plaintiff into custody¹; in others, that it is for the court to say whether the facts proved show proper cause². The point has however been finally decided in accordance with this latter view, though not without expressions of regret³; making the rule to conform to that of actions for malicious prosecution.

If the analogy furnished by the law of actions for malicious prosecution is to be fully carried out, and it appears reasonable that it should be, it will also be necessary for the officer to show that this reasonable ground for making the arrest consisted of facts within his own possession at the time of the arrest, and that he cannot justify on facts which afterwards came to his notice. Nor, on the other hand, if his justification lie in the facts before him at the time of taking the party into custody, will his defence be overturned by evidence of facts indicating innocence, that came to his notice after the imprisonment⁴.

At common law, no valid arrest without a warrant can be made for a misdemeanour, except on the spot⁵. To arrest a man, without process, on suspicion that he has committed a misdemeanour, although upon probable cause for his arrest, is a breach of duty. For example: The defendant, a constable, arrests the plaintiff without a writ on the statement of *J. M.*, that the plaintiff has committed the offence of perjury, by wilfully and corruptly making a false affidavit in a judicial proceeding before the Honourable

Arrest
for mis-
demeanour.

¹ *Beckwith v. Philby*, 6 B. & C. 635; *Rohan v. Sawin*, 5 Cushing (Mass.), 281; *Brockway v. Crawford*, 3 Jones (North Carolina), 433.

² *Hill v. Yates*, 8 Taunt. 182; *Davis v. Russell*, 5 Bing. 354.

³ *Lister v. Perryman*, L. R. 4 H. L. 521, 531, 538, 539.

⁴ See ante, p. 90.

⁵ Whether and how far this may have been changed in regard to the duties of policemen in large cities cannot here be considered. See Stephen's History of Criminal Law, 197, 199, 200.

W. W., judge of a court, and he takes the plaintiff into custody upon this charge, at the direction of *J. M.* He is liable to the plaintiff for a false imprisonment¹; though he would not have been had the offence charged been a felony.

And the arrest must not only have been made upon the spot: it must also have been made in the case of an actual breach of the peace, before the breach has entirely ceased. For example: The defendant, a constable, takes the plaintiff into custody without a warrant under the following circumstances: The plaintiff had been making a disturbance about certain premises in the night-time, and had refused, on request of the defendant, to desist. Perceiving that the defendant intends to arrest him, the plaintiff flees and is pursued, overtaken, and arrested; the disturbance having previously ceased. The defendant is liable².

In the case of affrays, however, an arrest may be made without a warrant not only during the actual breach of the peace,

Affrays.

but so long as the offender's conduct shows that the public peace is likely to be endangered by his acts. Indeed, while those are assembled together who have been committing acts of violence, and the danger of renewal continues, the affray may be said to continue; and during the affray, thus understood, the officer may arrest the offender not only on his own view, but even on the information or complaint of another. This is true even of an arrest by a private citizen³. For example: The defendant arrests the plaintiff without process under the following circumstances: The plaintiff had entered the defendant's shop to make a purchase, when a dispute arose between the plaintiff and a servant of the defendant resulting in an affray between them. The defendant, coming into the shop during the affray, orders the plaintiff to leave, which he refuses to do; the violence having then ceased, though there is still danger of a renewal of the affray. The

¹ *Bowditch v. Balchin*, 5 Ex. 378. See *Commonwealth v. Carey*, 12 Cushing (Mass.), 246, 252; *Commonwealth v. McLaughlin*, id. 615, 618.

² Compare *Baynes v. Brewster*, 2 Q. B. 375, where the defendant, on such facts, was a private citizen; but the rule would have been the same had he been an officer, as the language of Mr Justice Williams in that case shows.

³ *Timothy v. Simpson*, 1 Crompt. M. & R. 757; *Baynes v. Brewster*, 2 Q. B. 375, 386.

defendant now gives the plaintiff into the custody of an officer. This is no breach of duty to the plaintiff¹.

The example given leads to the consideration of the nature of the right of a private citizen to arrest offenders without process of court; for it is (probably) lawful for such a person to make an arrest upon a warrant under the same circumstances in which an officer could do so.

Right of private citizen to make arrest.

The rule of law in regard to arrests for misdemeanours by private citizens is the same as prevails concerning officers; they are entitled to make the arrest without process while the breach of the peace is going on, or (in accordance with the explanation given) still continues. And a private citizen has no right to make an arrest, without process, for a misdemeanour after its termination, though the breach of peace was committed about his own premises².

In regard to felonies, the rights of officers and private citizens are different. While an officer can arrest without a warrant upon probable cause, though no felony has been committed, a private citizen can safely make an arrest without a warrant only when (1) the felony charged has actually been committed, and (2) there was probable cause for supposing the party arrested to be guilty³.

¹ *Timothy v. Simpson*, *supra*.

² *Baynes v. Brewster*, 2 Q. B. 375, 386.

³ *Allen v. Wright*, 8 Car. & P. 522. In *Commonwealth v. Carey*, 12 Cushing (Mass.), 246, 251, Chief Justice Shaw, in a dictum, states the rule thus: 'A private citizen, who arrests another on a charge of felony, does it at the peril of being able to prove a felony actually committed by the person arrested.' But that statement, which was only a dictum, appears to be a mere slip. See *McCloughan v. Clayton*, 17 Rev. Rep. 669, and note by original reporter Lord Holt.

CHAPTER X

TRESPASS UPON PROPERTY

Statement of the duty. *A* owes to *B* the duty (1) not to break and enter *B*'s close, in *B*'s possession; (2) not to take or interfere with *B*'s possession of chattels.

The term 'close' signifies a tract of land, whether physically enclosed or not.

'Breaking and entering the close' is an ancient term of the law, now nearly gone out of use, indicating an unlawful entry upon land. The term 'entry' or 'unlawful entry' will be used in the present chapter as synonymous with 'breaking and entering.'

Wrongful taking and wrongful withholding possession of property are of course primitive wrongs; but in early times possession was looked upon as like ownership in land at the present day—we still speak of a man's 'possessions' as of his ownership. The remedy of trespass (to property) was accordingly conceived of at first as a remedy for interference with *actual* possession. In modern times it has been found necessary, as will be seen later, to extend the conception of trespass (for no new remedy has been invented) to certain cases in which the possession is fictitious,—where there is or was only a right of possession, as in the case of the fiction of relation in regard to land, and the right to take possession of goods. Trespass between co-tenants is an extension of trespass in another way. Of these cases in their place. The action of trespass has accordingly always been called a 'possessory' action.

§ 1. WHAT MUST BE PROVED

Trespass to land is an unlawful entry upon land; trespass to goods is an unlawful taking or interfering with the possession of goods. All other wrongful acts connected with the trespass are aggravation of the wrong. Accordingly, to prove an entry upon land in the plaintiff's possession, or the interrupting of the plaintiff's possession, or right to take possession, of goods is necessary to make, and will make, a *prima facie* case.

§ 2. POSSESSION

In order to maintain an action solely for damages for a trespass to land, and not merely for the recovery of the land, it is necessary, apart from statute, for the plaintiff to have had possession of the premises entered at the time of the entry. A person who enters the land of another without the latter's permission, the latter having before been unlawfully deprived of possession or the land having never been in his possession, *may* indeed violate a duty to the person entitled to the possession; but the common law requires the latter to get possession of the land before giving him damages for the wrong committed.

If however the party had possession at the time of the entry, and the trespasser ejected him, it would not be necessary for him to recover possession before he could sue for damages for the wrongful entry and expulsion; he had possession at the time of the trespass and disseisin, and that is sufficient for the purposes of such an action. He could not however recover damages for the loss sustained by reason of the disseisor's *occupancy*, until after a re-entry, or suit for recovery of possession—a point further to be considered hereafter.

On the other hand, possession at the time of the entry, if held under a claim of right, is *prima facie* sufficient in all cases to enable a person to maintain an action for an entry upon the land without his permission; and possession alone is not only *prima facie* but abso-

**Trespass
defined.**

**Possession in
actions for
trespass.**

**Possession
without
right.**

lutely sufficient against all persons who have not a better right than the possessor¹. It follows that one who is in possession of land under a claim of title, though without right, may recover for an entry by a wrongdoer; that is, by one who enters without a right, or under one not having a better right. For example: The defendant enters without permission upon land in the possession of the plaintiff, whose possession is under a void lease. The defendant is liable².

But the defendant is not necessarily guilty of breach of duty to such a possessor by reason of the fact that he (defendant) does not own the land. He may still have a legal or an equitable interest in the premises; he may be a lessee of the land; he may be a trustee of the estate; he may be a licensee of one having a right of entry. In any of these cases he would be entitled to enter upon the premises, if he could do so without breaking the peace. A licensee of one having possession may make a peaceable entry against a wrongdoer, though a licensee has no interest whatever in the soil, and could have no entry against the will of a person *entitled* to the possession. For example: The defendant enters, without permission of the plaintiff, premises of which the plaintiff is wrongfully in possession; the act being done by direction of the owner of the land, who is entitled to possession. The defendant violates no duty to the plaintiff³; though the case would have been different had he entered without authority of the owner⁴.

If there be two persons in a close, each asserting that the premises are his, and each doing some act in the assertion of the right of possession, he who has the better title or right is considered as being in possession: and the other is a trespasser⁵. The former is therefore in a position to demand damages of the latter for his wrongful entry. For example: The defendant is in possession of land without right,

¹ Cotenancy makes an exception. See post, p. 213.

² *Graham v. Peat*, 1 East, 244. 'Any possession is a legal possession against a wrongdoer.' Lord Kenyon.

³ *Chambers v. Donaldson*, 11 East, 65.

⁴ The subject of rights of entry in general will be considered hereafter, § 3. It is introduced here merely to show the consequences of possession.

⁵ See *Reading v. Royston*, 2 Salk. 423.

and so continues after the plaintiff, who is the owner, enters to take possession, ploughing the land. The defendant is guilty of trespass to the plaintiff¹. Again: The defendant is in occupancy of land jointly with the plaintiff, claiming to be a tenant in common of the premises with the plaintiff. His claim however is unfounded, and the plaintiff is owner of the close. The defendant may be treated by the plaintiff as a trespasser².

If neither of the parties in occupancy has a right to the close, the question whether either of them has violated a duty to the other, supposing each to claim possession, will turn upon the 'exclusive priority of possession.' The one who first entered, if he took exclusive possession, will be entitled to damages against the other; if he did not so take, neither can recover against the other. For example: The defendants claim a right to take cranberries in an unoccupied field under a license from one *H*. The plaintiffs have previously entered into possession of the land, and forbidden all persons by public notice to take cranberries therefrom, except on certain conditions, with which the defendants do not comply. *H*, under whom the defendants claim, had entered before the entry of the plaintiffs; but neither *H*, nor the defendants, nor the plaintiffs have any right to the soil or the berries; and neither ever had exclusive possession. The defendants have violated no duty to the plaintiff³; and so in the converse case⁴.

There is this important distinction between the law relating to possession of real property and that relating to possession of personalty: to enable a plaintiff to recover for trespass to realty, he must have had a real possession⁵; while a plaintiff may recover for trespass to personalty if he had a right to take possession,—in which case he is said to have constructive possession. To assimilate the two cases, it is often said that the right to take possession of personalty draws possession in law. Whoever then has a right to the possession

¹ *Butcher v. Butcher*, 7 B. & C. 399.

² *Hunting v. Russell*, 2 Cushing (Mass.), 145.

³ *Barnstable v. Thacher*, 3 Metcalf (Mass.), 239.

⁴ *Id.*

⁵ There is one exception, the case of possession of land by what is called 'relation'; of that, further on. See p. 215. This is the one true case of constructive possession of realty, in regard to trespass.

of a chattel, whether it be towards all the world or only towards the defendant, is in a position to sue for an interruption of his enjoyment thereof. For example: The defendant, without permission, takes goods out of the possession of *A*, after *A* has sold them to the plaintiff, but before they have been delivered to him. This is a breach of duty to the plaintiff¹.

What constitutes real possession however, as distinguished from a right to take possession, is one of the difficult questions of the law, especially when it comes to the application of definition to particular cases. Contact certainly is not necessary; it is enough for a man, so far as that is concerned, that no one else has possession, and that he has in consequence power to take the property into hand at will. Indeed, a man who is holding property of right has possession, against one who may be struggling or striving against him or others, on the spot or in court, to gain possession; this follows from what has already been stated.

That conception of the term 'possession' which on the whole most nearly harmonizes with the authorities on specific situations where there is no strife over the right, appears to be this: there must be (1) a power of control over property, and (2) a purpose to exercise the same for the benefit, at the time, of the holder, or facts from which such a purpose could be assumed if the mind were directed to the object of possession². It is clear that without these two facts there is no true possession in the eye of the law; but to say that there *is* possession in all cases with them would be to say that the authorities are in harmony. A mere servant may have 'detention' or custody, but, as servant,

¹ Bacon's Abr. Trespass C. 2; Bigelow's L. C. Torts, 370. Quære, whether possession of personalty in itself will support an action, as e.g. the possession of a thief who is dispossessed by another thief? It is urged that mere possession is enough. Pollock & Wright, Possession, 91, 93, 147, 148. It may on the other hand be urged that only that sort of possession which is capable of ripening into a title should be protected, as e.g. the possession of a finder. In the Roman law a thief could not have the 'actio furti.' Dig. 47, 2, 11; id. 47, 2, 12, 1; Inst. 4, 1, 13. See also Buckley v. Gross, 3 Best & S. 566, 573, Crompton, J. As to the criminal law of such cases see Commonwealth v. Rourke, 10 Cushing (Mass.), 397, 399; Pollock & Wright, Possession, 118 et seq.

² Compare London Banking Co. v. London Bank, 21 Q. B. D. 535, 542; and see Regina v. Ashwell, 16 Q. B. D. 190.

can have no possession, according to current views, because a servant does not hold in his own right¹; but what of an agent², or a bailee for hire, or a tenant at will? The authorities are not agreed. It is said that none of them has possession. Thus, some say of tenants at will, that both tenant and landlord cannot be in possession at the same time, and the landlord certainly is possessed in contemplation of law. Others treat both as having rights of possessors; this in effect is certainly the legal view³. Agents and bailees for reward have possession, by the better view⁴. Indeed any bailee liable over to his bailor may, it seems, maintain trover⁵.

Knowledge of the right appears to be unnecessary to possession; if a thing of value is delivered for me, I am presumed to accept it until I refuse. The delivery, whether I know it or not, is significant of my possession; enough that no one else has possession⁶.

A reversioner or remainder-man after an estate for years can indeed maintain an action for injuries done to his interest, notwithstanding the fact that the land is in the possession of the termor. Injuries done to such interests are not however, in strictness of common-law ideas, trespasses. The trespass consists in the wrongful entry upon the land, and this is a tort to the tenant, not to

**Reversioner
and remain-
der-man.**

¹ Year Book 13 Edw. 4, 9, 10, pl. 5; 21 Hen. 7, 14, pl. 21; *Harris v. Smith*, 3 Sergeant & Rawle (Pennsylvania), 20; *Hampton v. Brown*, 13 Iredell (North Carolina), 18. These are all common-law authorities; but the point is not free from doubt. See *Holmes*, Common Law, 226-228; *Moore v. Robinson*, 2 B. & Ad. 817; *Mathews v. Hursell*, 1 E. D. Smith (New York), 393; *Regina v. Ashwell*, 16 Q. B. D. 190.

Perhaps a reason in regard to the case of the servant is that his interest is too slight; *de minimis non curat lex*. Then the criminal side of the case may be noticed; if the servant has possession, the possession has been given to him by his master, and he cannot be guilty of larceny.

² See *Knight v. Legh*, 4 Bing. 589, Best, C. J., holding that an agent might bring trover, as having possession.

³ See *Starr v. Jackson*, 11 Mass. 519, where the cases are reviewed; and see Markby, *Elements of Law*, § 388, 3rd ed. Tenant at will clearly holds for himself so long as he *wills* and is permitted to hold.

⁴ As to bailees see *Claridge v. Tramways Co.*, 1892, 1 Q. B. 422. ⁵ *Id.*

⁶ It seems then that if an article is delivered to my servant, to be taken to me, and he makes off with it, with felonious intent, he is guilty of larceny from me. It was his felonious act, not the delivery of the article to him, that gave him possession.

the landlord or remainder-man; since it is an interference with the possession, which belongs to the tenant. For example: The defendant enters upon the plaintiff's land, let to another for years, in the assertion of a right of way, driving thereon his horses and cart, and continuing so to do after notice from the plaintiff to quit. The defendant has violated no duty to the plaintiff¹.

Damage done to the inheritance in the case of leasehold or mortgaged land is waste if committed by the tenant or mortgagor, and a tort which may be deemed to be in the nature of (but not strictly as) a trespass, if committed by a stranger. But whatever term may be applied to the act, it is a breach of duty to the landlord or mortgagee, for which he is entitled to recover damages. For example: The defendant, a tenant, or a mortgagor, or a licensee, or a stranger, cuts down trees on land owned by the plaintiff, or of which he is mortgagee or remainder-man, without the plaintiff's consent. This is a breach of duty to the plaintiff, and the defendant is liable to him in damages; though the plaintiff is not in possession².

A similar rule of law prevails in regard to injuries done to personal property held on lease or in pledge, or by a mortgagor in possession. For an injury done to the possessor's interest merely, that is, for a simple unlawful taking of the goods, the remedy belongs to the possessor alone; but for an injury done to the reversion, or to the mortgagee if the goods be mortgaged, the landlord or the mortgagee is entitled to treat the act as a breach of duty to him and call for redress³. For example: The defendant, a sheriff, levies on, sells and delivers goods in the possession of *S*, whose right to the possession rests upon an agreement by the plaintiff to convey the same to him upon the payment of notes given therefor. The defendant has not been

**Personal
property held
on lease or in
pledge.**

¹ *Baxter v. Taylor*, 4 B. & Ad. 72. The action was 'case.'

² See *Young v. Spencer*, 10 B. & C. 145; *Page v. Robinson*, 10 Cushing (Mass.), 99; *Cole v. Stewart*, id. 181. None of these are cases of actions by remainder-men, but they cover such cases in principle. The form of action at common law is 'case' and not trespass.

³ In 'case,' or trover, at common law. See *Farrant v. Thompson*, 5 B. & Ald. 826, where trover was brought.

led by the plaintiff to suppose that the goods belong to *S*; on the contrary, the defendant has notice, at the time of the levy, of the plaintiff's title. The defendant's act in disposing of the goods is a breach of duty to the plaintiff, and he is liable in damages; though the right of possession is in *S*¹.

A man's close includes not only his actually enclosed land, but also all adjoining unenclosed lands held by him; and if he is in possession of any part of his premises, he is in possession of the whole, unless other parts are occupied by tenants for term of years or by persons who claim adversely to him. The owner has the 'power of control' and the 'purpose to exercise the same' for himself; he is therefore in a proper position to recover damages for trespass committed in any part of his premises, the unenclosed as well as the enclosed². For example: The defendant, without permission, enters and cuts timber in an open woodland of the plaintiff, adjoining a farm upon which the plaintiff resides. The plaintiff is in possession of the woodland, and is entitled to recover³.

The foregoing proposition in regard to possession of adjoining unenclosed land supposes that the party injured has a right to the possession of the enclosed premises actually occupied by him. One however who is in possession of land without title or right can have no such extended possession; the rights of a bare possessor are limited by the bounds of his immediate occupation and control. For example: The defendant, having wrongful possession of the south end of a lot, cuts timber upon the north end thereof, lying without the limits of his actual

¹ *Ayer v. Bartlett*, 9 Pickering (Mass.), 156.

² Such possession is often called 'constructive,' but that term, like the term 'symbolical' possession, is apt to darken counsel. Possession is surely real when one's control can be extended over the property at any time. See Markby, *Elements of Law*, §§ 353, 359, 360, 3rd ed.

³ *Machin v. Geortner*, 14 Wendell (New York), 239; *Jones v. Williams*, 2 M. & W. 326, 331; *Lord Advocate v. Blantyre*, 4 App. Cas. 770, 791; *Coverdale v. Charlton*, 4 Q. B. D. 104, 118. 'I hold that there is no usage of the country, nor rule of the common law, nor any reason requiring a man to enclose his timber land, and that for any possible purpose that can be named the woods belonging to a farm are as well protected by the law without a fence as with one.' *Tod, J.*, in *Penn v. Preston*, 2 Rawle (Pennsylvania), 14.

occupation; which timber has been purchased and duly marked by the plaintiff. The land on which the timber stood is not in the possession of the defendant, and the plaintiff is entitled to damages for the violation of his right of property; though he has no right to the land¹. Again: The defendant, without right or authority, enters upon an open woodland adjoining enclosed land in the wrongful possession of the plaintiff. The act is no breach of duty to the plaintiff².

One of several cotenants, whether of real or of personal property, cannot maintain an action for acts relating to the common property, not amounting to an ouster; **Cotenancy.** because all the cotenants have equal rights of possession and property: For example: The defendant, cotenant of land with the plaintiff, cuts and carries away therefrom timber, at the same time denying to the plaintiff any right in the premises, but not withholding possession from him. The defendant has violated no duty to the plaintiff³.

If, in the case of real estate, the act of the defendant cotenant however amount to an ouster of the plaintiff from the possession of the common property, the act is a trespass⁴, and the defendant is liable; provided, at least, an action of ejectment would at common law be maintainable. For example: The defendant, being cotenant with the plaintiff of a certain room in a coffee-house, expels therefrom the plaintiff's servant, in derogation of the plaintiff's right of occupation. The defendant is liable to the plaintiff in damages; since an action of ejectment for restoration to possession would lie⁵.

¹ Buck v. Aiken, 1 Wendell (New York), 460. The plaintiff became possessed of the trees as soon as they were cut down by the defendant.

² It is difficult to find judicial authority for this example, because, perhaps, of its simplicity. Its correctness is clear.

³ Filbert v. Hoff, 42 Penn. St. 97; Reading's Case, 1 Salk. 392.

⁴ This is an extension of the idea of trespass, as being a *wrong* to the plaintiff's possession, for as the defendant cotenant had a *right* to the entire possession, his exercise of that right even against one having the same kind of right could not in strictness be a trespass.

⁵ Murray v. Hall, 7 C. B. 441. Ejectment was originally an action of trespass, and has always included trespass. Hence, if that form of remedy may be used, trespass lies. See *infra*, p. 215, note.

Whatever amounts, or if persisted in might amount, to an effectual privation of the associate tenant of participation in the possession of the common property amounts to an ouster, even though there be no actual expulsion or withholding of possession from him. For example: The defendant, cotenant with the plaintiff of a certain close, digs up the turf and carries it away, without the plaintiff's consent. This is an ouster, for which the defendant is liable to the plaintiff in damages; since, if the cotenant were permitted to take the turf, he would be entitled to dig away the soil below the turf, and might thus effectually deprive his fellow of his right to the possession¹.

If the criterion of this remedy between cotenants for an ouster be the question whether an ejectment would be maintainable, it follows that an action for trespass in respect of *goods* held in common cannot be maintained by one cotenant against another; for an action of ejectment lies for the recovery of land only. Nor indeed is there any authority in opposition to this suggestion; the question of the right of action having, so far as the reported authorities go, always arisen in regard to common rights in realty². Some decisions in America have denied the remedy even when resorted to in cases of real property³.

¹ *Wilkinson v. Haygarth*, 12 Q. B. 837. The defendant would not have been liable to an action for *trespass* for taking and carrying away the growing grass or crops. *Id.* Accounting between cotenants was provided for by the statute of 4 Anne, c. 16, § 27, where one cotenant has taken more than his share of the profits.

² See the cases cited in Bigelow's *L. C. Torts*, pp. 358-360.

³ *Wait v. Richardson*, 33 Vermont, 190. See also *Bennet v. Bullock*, 35 Penn. St. 364, 367.

The subject has passed through four distinct stages. The following appears to be the history of it:—

1. By stats. 31 Hen. 8, c. 1 (1539), and 32 Hen. 8, c. 32 (1540), partition was allowed between joint tenants and between tenants in common, of lands.

2. When Littleton wrote, and later, an ousted cotenant of land for years could have ejectment ('*ejectio firmæ*'), but not, it was said, trespass. Tenures, §§ 322, 323 (West, 1581). But see as to trespass, Fitzh. N. B. 208 H, before the statutes giving partition. (The writ quoted in Fitzh. is in favour of a prioress—hence before suppression of the monasteries, 1536. The writ however is not for breaking and entering the close, but for *destroying* things in it, and so making the close useless, like the cases in Coke now to be mentioned.)

3. Coke thinks damages could be recovered for ouster; it was certain that trespass lay for *destruction* of the common property. Co. Litt. 199 b, killing

In respect of personal property however it will be seen in the next chapter that an action for the conversion of the common chattel can be maintained in certain cases. The difficulty thus relates more to the form of action than to the substance of things. It may therefore be laid down, that for one tenant in common of personal property to withhold possession of the chattel from his associate, or to expel him from participation in the possession, or to appropriate to himself more than his share of the profits arising from the property, is a breach of legal duty to the latter, for which the law gives redress¹.

It has been observed that, in order to maintain an action at common law for trespass to land, possession of the land at the time of the wrongful entry is necessary. But the common law does not allow a person who has wrongfully entered, to take and enjoy the profits of the land, or to commit depredations upon the premises during his occupancy, without a reckoning. If the owner or person entitled to the possession subsequently obtain possession of the land, the law treats him, by a fiction of relation, as having been in possession during all the time that has elapsed since he was ejected from the premises².

The consequence is, that upon his re-entry he becomes entitled to sue for the damage which he has sustained at the

deer in deer park or doves of a dove-cot, the essential things of the common tenancy. See Fitzh. N. B. ut supra (published in 1534).

4. In 1849 *Murray v. Hall*, 7 C. B. 441, ante, p. 213, held that trespass lay for an *expulsion* because ejectment lay, ejectment including trespass. See the precedents of declaration in ejectment, and the fact that ejectment is conclusive of the right to mesne profits.

The Roman law appears to have been free from the difficulties of the English. For the *wounding*, as well as for the death of a slave, a co-owner had an action against his wrongdoing associate, from early times. *Lex Aquilia*, fr. 19-21; Grueber, pp. 56, 57.

¹ The difficulty in the way of an action for trespass is that the defendant, tenant in common, had a right of possession, and that is inconsistent with the action. But in an action for the conversion of a chattel, it matters not that the defendant had a right of possession. The gist of such an action is not (as it is in trespass) the wrongful taking possession, but the conversion of the plaintiff's right.

² Here is a case of true constructive possession in realty. See ante, p. 208, note.

hands of the party who has usurped the possession. The remedy thus allowed is called an action for mesne profits; that is, for the value of the premises during the period in which the plaintiff has been kept out of possession by the defendant. The plaintiff is also entitled to recover for all wrongful entries upon and damages done to his property in the meantime¹. For example: The defendant enters upon premises of the plaintiff, of which the plaintiff has been disseised, and removes buildings therefrom. The plaintiff subsequently re-enters, and then brings suit for damage done to his property. He is entitled to recover².

There is conflict of authority in regard to the existence in the disseisee of a right of action for mesne profits against one who, before the plaintiff's entry, had succeeded the disseisor by descent or purchase; that is, in the language of the law, against a stranger. On the one hand, it is said that to take a supposed title from another cannot be a trespass, and therefore mesne profits arising during the latter's occupation cannot be recovered of him³. On the other hand, the apparent injustice of this doctrine towards the owner has been urged, and the contrary conclusion reached⁴.

Between the extremes of these rulings however there is an important class of cases in America, in regard to which there is little conflict. These are cases in which the defendant claims under one who has been let into possession under legal process. In cases of this kind it has been held that the defendant is not liable for mesne profits; and it seems just, as well as conformable to the doctrine of

¹ Liford's Case, 11 Coke, 46, 51. As to cases between landlord and tenant see (under statute) *Smith v. Tett*, 9 Ex. 307; *Doe v. Harlow*, 12 Ad. & E. 40; *Doe v. Challis*, 17 Q. B. 166; *Pearse v. Coker*, L. R. 4 Ex. 92.

² *Dewey v. Osborn*, 4 Cowen (New York), 329. This case shows also that the party on re-entry is in a position to sue for every entry upon his lands made without authority.

³ Liford's Case, 11 Coke, 46, 51; *Barnett v. Guildford*, 11 Ex. 19, 30; *Case v. De Goes*, 3 Caines (New York), 261, 263; *Van Brunt v. Schenck*, 10 Johnson (New York), 377, 385; *Dewey v. Osborn*, 4 Cowen (New York), 329, 338.

⁴ *Holcomb v. Rawlyns*, 2 Cro. Eliz. 540 (decided before Liford's Case); *Morgan v. Varick*, 8 Wendell (New York), 587.

trespass upon lands, that one who has obtained possession under the disseisor by process of law should be presumed to be rightly possessed while the process (and the possession by virtue of it) continues in force. For example: The defendant enters and occupies land of the plaintiff under a writ of possession, executed against one who had wrongfully disseised the plaintiff. The writ is afterwards set aside, and the plaintiff resumes possession. The defendant is not liable for the profits consumed during his occupancy¹. Again: The defendant enters and takes possession of the plaintiff's land under a license from one who has been put into possession against a wrongdoer under a writ of restitution, which writ is afterwards quashed. The defendant is not liable for the mesne profits².

It would seem also that purchasers, third persons, under judicial sales, should stand in a like situation; for, though they do not acquire title from parties let into possession under legal process, they take through the sheriff, who may reasonably be presumed to have authority to sell. And there is judicial authority for this view³. It would (probably) be otherwise if the purchaser should be the person who had instituted the invalid proceedings under which he was let into possession⁴.

The non-liability of the purchaser or heir extends however only to profits consumed by him. If such person sow the land, or cut down trees, or grass, or crops, and sever them, and carry them away or sell them to another, the disseisee, after regress, may take the things severed wherever he can find them, or, if he cannot find them, recover their value of the person lately in possession. The regress of the disseisee has relation to the beginning of the last occupation, and the title to the things severed is therefore in him, which title the carrying away and disposing of cannot divest⁵.

¹ *Bacon v. Sheppard*, 6 Halsted (New Jersey), 197, following *Menvil's Case*, 13 Coke, 19, 21.

² *Case v. De Goes*, 3 Caines (New York), 361, following *Menvil's Case*, *supra*.

³ *Dabney v. Manning*, 3 Ohio, 321.

⁴ See further *Bigelow's L. C. Torts*, 362-366.

⁵ See *Liford's Case*, *supra*. But of course if the owner take away the things severed, the defendant can recoup their value in trespass for the mesne profits. *Id.*

§ 3. WHAT CONSTITUTES A TRESPASS TO PROPERTY.

The gist of an action for trespass to land consists in the wrongful entry upon it, and so in interfering with the owner's (or tenant's) right of entire possession. Any entry upon land in the rightful possession of another, without license or permission, is a breach of duty to the possessor; and this too though the land be unenclosed. It follows that an action is maintainable for such an entry, though it be attended with no damage to the possessor. For example: The defendant without permission enters upon unenclosed land in the lawful possession of the plaintiff, with a surveyor and chain-carriers, and actually surveys part of it, but without doing any damage. The act is a breach of duty to the plaintiff, and the defendant is liable at least to nominal damages¹.

The act is a breach of duty (though not in strict technical sense a trespass) even if the close entered be a private way, if only the plaintiff has a right of passage along or across it; it matters not that the plaintiff has no right to the soil². For example: The defendant deposits articles at various times in a passage-way to the use of which he has no right, and the plaintiff has a right, though the ownership of the soil is in another. The defendant is liable; though he removes the articles in every instance before the plaintiff desires to pass out, and never in fact hinders the plaintiff in entering or in going out of the passage³.

A close is deemed to have been broken and entered even though the act was not in fact committed within it but only against its bounds. To bring anything against such bounds without permission is a trespass. For example: The defendant, without permission, drives nails into the outer wall of the plaintiff's building, which

¹ *Dougherty v. Stepp*, 1 Devereux & Battle (North Carolina), 371; *Hobson v. Todd*, 4 T. R. 71, 74. Buller, J.: 'The right has been injured.' Should the defendant repeat the offence he may be made to smart for it in damages. *Williams v. Esling*, 4 Barr (Pennsylvania), 486.

² The action under the old system was 'case,' not trespass.

³ *Williams v. Esling*, 4 Barr (Pennsylvania), 486.

stands upon the line of the plaintiff's premises. This is a breach of duty for which the defendant is liable in damages¹. Again: The defendant heaps up dirt close to the plaintiff's boundary wall, and the dirt of itself falls against the wall. This is a trespass².

An entry upon land, or a taking of goods, is justifiable when effected either (1) by license or consent of the party, or (2) by license of the law; a license being a mere permission to do what otherwise would be unlawful, and not a property right. The term 'license or consent of the party,' as here used, has reference to cases in which there is nothing beyond an actual consent, either in answer to a request for permission, or by specific or general invitation by the possessor; as e.g. in the case of a shopkeeper. Cases of this kind sufficiently explain themselves, and need not be dwelt upon. The term 'license of the law' has reference to cases in which a permission is given regardless of the will of the owner or occupant, including cases in which, in point of fact, there may at the same time be a license of the party, as for instance the case of an innkeeper who both invites and, generally speaking, must receive guests; enough that the license is paramount to the will of such person.

In cases of the first kind the license is revocable in respect of future acts, though it be granted by contract, unless it is 'coupled with an interest'; the licensor may be liable for breach of contract, and yet revoke the license, so as to take away the licensee's permission³. A license is 'coupled with an interest' when it comprises or is connected with a grant⁴.

The second kind needs some special explanation. The law licenses an entry upon the land of another, or the taking possession of another's goods, in many cases; and in these the license cannot be revoked (except by the State). The first in importance of such cases

**Justification
of entry or
taking goods:
license.**

**License
coupled with
an interest.**

**License by
law: condi-
tion implied.**

¹ Lawrence v. Obee, 1 Stark. 22.

² Gregory v. Piper, 9 B. & C. 591.

³ Wood v. Leadbitter, 13 M. & W. 838; Hyde v. Graham, 1 H. & C. 593. But the licensee may sometimes be entitled to an injunction against the revocation. Frogley v. Lovelace, Johns. 333.

⁴ Wood v. Leadbitter, supra, at p. 844.

is where the law has commanded the entry or the taking possession; the entry and levy of a sheriff by virtue of a valid precept being the chief example. In such cases reasonable force may be used to effect an entrance; though an entrance to an occupied dwelling-house cannot be forced, except for the purpose of serving criminal process¹. In cases in which the license of the law is only implied, forcible entry can seldom be made, except in the case of an owner of land entitled to take actual possession². That is to say, apart from the exceptional cases, the license appears to be conditional; the entry may be made, provided that it can be made without breach of the peace³. The following are cases of the kind:—

Inns and coaches of common car- riers.	One case is where an entry is made into an inn ⁴ , or perhaps into the coach of a common carrier of passengers. Such an entry is lawful if the party is in a fit condition to be received, paying in advance—and, in the case of a passenger, showing a ticket ⁵ —when required.
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Entry by creditor.	A second case is where the party in possession of land has bound himself by debt to another, without any stipulation in regard to the place of payment. In such a case the creditor is allowed by law to enter his debtor's premises for the purpose of demanding payment ⁶ .
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¹ *Swain v. Mizner*, 8 Gray (Mass.), 182; *People v. Hubbard*, 24 Wendell (New York), 369. Great exigency affecting the public, such as an extensive conflagration, would probably make another exception.

² *Sampson v. Henry*, 19 Pickering (Mass.), 36; *Churchill v. Hulbert*, 110 Mass. 42.

³ *Churchill v. Hulbert*, *supra*. See *Scribner v. Beach*, 4 Denio (New York), 448, 451. Statute imposes penalties for forcible entry upon premises. But the question is, whether a person, having a license to enter, is liable not only for the penalties but also as a trespasser. It appears to be clear that if the person entering is owner of the land, and entitled to take possession, he is liable only to the penalties of the statute. *Sampson v. Henry*, *supra*; *Biddall v. Maitland*, 17 Ch. D. 174; *Edwick v. Hawkes*, 18 Ch. D. 199. If however he should commit an assault upon the occupant, that, not being necessary to his entry, would make him liable for *that* act. *Sampson v. Henry*, *supra*. To enter forcibly in most other cases would be a trespass, because it would be in violation of the condition annexed by law to the license. See *Churchill v. Hulbert*, *supra*; *Wheelden v. Lowell*, 50 Maine, 499.

⁴ *Six Carpenters' Case*, 8 Coke, 146.

⁵ See *Butler v. Manchester Ry. Co.*, 21 Q. B. Div. 207; *Shelton v. Lake Shore Ry. Co.*, 29 Ohio St. 214.

⁶ *Black. Com.* iii. 212.

A third of these cases is where the party in possession holds, as tenant, a piece of real property of another. In such a case the law allows the latter to make an entry upon the land for the purpose of ascertaining whether his interests are properly regarded by the possessor. For example: The defendant leases land to the plaintiff, and subsequently enters to see if the latter has committed waste. This is no breach of duty to the plaintiff¹.

A fourth case is where goods have been placed upon a man's land under a tenancy at will, or where goods have been sold which lie upon the premises of the vendor. In the absence of any special agreement or general custom concerning the delivery of the goods the owner may go upon the premises and take them². For example: The plaintiff lets premises to the defendant at will, on the terms that the defendant shall have reasonable time to remove his goods, after notice to quit. The defendant enters accordingly, after termination of the lease, to get his goods, against the plaintiff's refusal to allow him. This is no breach of duty³.

A fifth case is where the owner of land has wrongfully burdened another with the possession of his (the former's) goods. In such a case the goods may be taken and put upon the owner's premises; and neither the taking of the goods nor the entry upon the owner's premises is unlawful. For example: The defendant takes an iron bar and sledge belonging to the plaintiff, and puts them upon the plaintiff's land; the plaintiff having first brought them upon the defendant's premises, and then without permission having left them there. The entry is lawful⁴.

A sixth case is where a man's goods, without his act, have got upon the land of another. In such a case the owner of the goods may enter and take them. For example: The defendant enters upon the plaintiff's

¹ Black. Com. iii. 212.

² *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400; *McLeod v. Jones*, 105 Mass. 403 (sale of goods on vendor's land).

³ *Cornish v. Stubbs*, *supra*.

⁴ *Cole v. Maundy*, *Viner's Abr. Trespass*, 516. See other cases there referred to.

land to get apples, which by the action of the wind have been blown *over* the line, from the defendant's trees into the plaintiff's close. The defendant is not liable¹. Again: The defendant enters upon the plaintiff's land to get his own goods which the plaintiff has wrongfully taken and put there. This is lawful²; though it would have been otherwise had the plaintiff come properly into possession of the goods³.

A seventh case is where a person enters the premises of another to save life or to succour a beast in danger. Such an **Entry to save life.** act is not a trespass; but it is said that the case would be different if the entry was made to prevent a person from stealing the owner's beast, or to prevent cattle from consuming his corn⁴. The distinction made between the cases is that in the former case the loss of the animal would be irremediable, that is, that particular animal (which might be very valuable) could not be replaced; while in the latter case the animal might be recovered from the thief, or the corn replaced by purchase or by a new crop: all corn being substantially alike. The distinction however sounds medieval.

An eighth case is where a man creates, or after notice continues, a nuisance upon his premises, to the peculiar injury of his neighbour. In such cases the latter may **Entry to abate a nuisance.** enter and abate the nuisance. For example: The defendant enters upon the plaintiff's premises, and removes the eaves of a shed, which overhang the defendant's land and in rainy weather drip upon his premises. This is no breach of duty to the plaintiff⁵.

A ninth case is where an entry has been made upon land of

¹ *Millen v. Fawdry*, Latch, 119, 120. It would be otherwise if the defendant should shake the trees. Bacon's Abr. Trespass, F. The action of the wind would, it seems, be immaterial, if the branches *overhung* the plaintiff's land; for that would itself be a nuisance. Comp. *Penruddock's Case*, 5 Coke, 100 b. The defendant should be allowed to enter only when he is entirely in the right, as where the apples are blown over the fence into the plaintiff's grounds.

² *Viner's Abr. Trespass*, 1 (A); *Bigelow's L. C. Torts*, 382.

³ See *Bigelow's L. C. Torts*, 381.

⁴ Bacon, *ut supra*.

⁵ *Penruddock's Case*, 5 Coke, 100 b; *Bigelow's L. C. Torts*, 383, where various distinctions as to such cases are mentioned. By the Roman law there appears to have been no such right to abate the nuisance. *Lex Aquilia*, fr. 29, § 1, of overhanging roofs. See Grueber, pp. 113, 114.

another by reason of necessity, without the fault of the person entering. Such an entry is justifiable. For example: The defendant runs into the plaintiff's premises to escape a savage animal, or the assault of a man in pursuit of him. The defendant is not liable¹. Again: The defendant enters upon the plaintiff's premises to pass by a portion of the highway which at this point is wholly flooded, but without the act of the defendant. The entry is justifiable².

It has already been seen that a trespass to property consists in an unlawful entry of land or taking of goods³, and a trespass by imprisonment, in an unlawful arrest. There is one case however in which, by reason of subsequent acts, a person may be treated as a trespasser notwithstanding the lawfulness of the entry, or taking possession, or of the arrest; the result thus being to deprive the party of the justification of the lawfulness of the original act, and, by a fiction of law, to make him a trespasser *ab initio*. According to this fiction, one who has taken possession of goods, or entered upon land, by virtue of a license of the law, becomes a trespasser *ab initio* (notwithstanding the lawfulness of the levy or entry), where afterwards, while acting under the license, he commits an act which in itself amounts to a trespass⁴. For example: The defendant, a sheriff, remains an unreasonable length of time in the plaintiff's house in possession of goods taken by him in execution. He is a trespasser *ab initio*⁵.

But, in order to become a trespasser *ab initio*, the subsequent act must, it has been held, be a technical trespass or at least show a purpose to make use of the license as a mere cover for a wrongful act, or it should otherwise appear that the obtaining the license was a mere subterfuge to conceal some improper purpose. If this is not the case—if the entry was in good faith, and the subsequent act was not a trespass—the

¹ Year Book 37 Hen. 6, p. 37, pl. 26.

² *Absor v. French*, 2 Show. 28.

³ Where *A*'s goods are unlawfully sold and delivered by *B*, must the former make demand for them before he can sue for the trespass? The question is not so important now as formerly, for suit is more generally brought in such cases for conversion. See post, p. 234.

⁴ *Six Carpenters' Case*, 8 Coke, 146; *L. C. Torts*, 386.

⁵ *Ash v. Dawney*, 8 Ex. 237; *Rowley v. Rice*, 11 Metcalf (Mass.), 337.

party is not to be treated as a trespasser from the beginning, though the act committed be wrongful and subject him to liability. For example: The defendant, an officer, enters upon the plaintiff's premises by virtue of a lawful writ, to make a levy for debt. While there, in the course of his business as an officer, he wrongfully extorts money from the plaintiff. He is not a trespasser from the beginning of his entry, though the extortion was a breach of duty for which he would be liable in damages: extortion not being a trespass¹. Again: The defendant refuses to drop a distress on the plaintiff's goods, upon tender by the plaintiff of the rent due. The defendant is not a trespasser².

These examples, on consideration, will show the importance of the doctrine of trespass *ab initio*. If the person's conduct make him obnoxious to this doctrine, it follows (probably) that all acts done, such as, in the case of an officer, levies made, intermediate the entry and the trespass, are void; since, his entry being a trespass, he could not, according to general principles of law, thereafter do an act against the will of the occupant which would be legal³. Besides, he would be liable for the entry as well as the after acts. The doctrine does not therefore concern the form of remedy alone.

¹ *Shorland v. Govett*, 5 B. & C. 485. See *Six Carpenters' Case*, *supra*. But compare *Holley v. Mix*, 3 Wend. 350. If the entry under the writ was merely to cover the purpose to extort there would probably be a trespass *ab initio*. Compare *Grainger v. Hill*, 4 Bing. N. C. 212, ante, pp. 102, 187, n. That, it seems, suggests the true distinction. *Six Carpenters' Case*, *supra*. See also *Commonwealth v. Rubin*, 165 Mass. 453, Holmes, J. The doctrine is held applicable in America only to cases in which there has been an 'abuse of some special and particular authority given by law, as in the case of process.' *Esty v. Wilnot*, 15 Gray (Mass.), 168. The exercise of the power given is *conditional* upon keeping wholly within legal limits. *Id.*, Hoar, J.

The doctrine however is hard to understand when there is nothing but a subsequent trespass. What is there in trespass which should make the wrong react; why should not other subsequent wrongful conduct react as well?

² *West v. Nibbs*, 4 C. B. 172.

³ Compare *Hisley v. Nichols*, 12 Pickering (Mass.), 270, denying certain dicta of the books. *Hisley v. Nichols* decides that a levy made by breaking open the outer door of an occupied dwelling-house (a house is a man's castle) is invalid, and the officer is liable for the value of the goods taken as well as for the unlawful entry. The same result should in principle follow if, by an act subsequent to the entry, he become a trespasser from the beginning.

This doctrine of trespass *ab initio* applies however only against persons who have entered land or taken goods by license of law. A person cannot treat as a trespasser from the beginning one to whom he has himself given permission to enter, or take his goods, whatever be the nature of his subsequent acts¹. For example: The defendant, by permission of the plaintiff's wife enters the plaintiff's house in his absence, and while there wrongfully gets possession of papers, and carries them away. This does not make him a trespasser *ab initio*².

As where the entry was made in good faith the subsequent act must amount to a trespass, it becomes necessary to ascertain somewhat precisely the technical signification of that term. It is difficult to define a trespass, but the following will serve to indicate the proper meaning of the term: (1) Any wrongful intended contact with the person is a trespass. (2) Any wrongful entry upon the plaintiff's land or interference with the plaintiff's possession of personalty is a trespass. (3) Any wrongful act committed directly with force is a trespass, though no physical contact with the person of the plaintiff or with his property be produced; as in the case of an imprisonment without contact, or the firing of a gun under the plaintiff's window, to alarm the inmates of his house. In cases like these, force is said to be implied. Upon the same ground, the seduction of the plaintiff's wife, daughter, or servant might perhaps be considered as a trespass, and the act was formerly so treated by the courts³; the consent given was not the plaintiff's consent. But the present view is different⁴.

On the other hand, (1) a mere non-feasance (that is, a pure omission) cannot be a trespass⁵; (2) nor can there be a trespass where the matter affected was not tangible, and hence could not be immediately injured by force, as in the case of an injury to reputation or health; (3) nor can there be a proper trespass

¹ *Six Carpenters' Case*, *supra*; *Esty v. Wilmot*, 15 Gray (Mass.), 168; *Allen v. Crofoot*, 5 Wendell (New York), 506.

² *Allen v. Crofoot*, 5 Wendell (New York), 506.

³ *Tullidge v. Wade*, 3 Wils. 18; *Chitty, Pleading*, i. 126, 133.

⁴ *Macfadzen v. Olivant*, 6 East, 387. *Chitty* prefers the old doctrine. *Pleading*, i. 133.

⁵ *Six Carpenters' Case*, 8 Coke, 146.

where the right affected is incorporeal, as a right of common or way; (4) nor where the interest injured exists in reversion or remainder; (5) nor where there is no right of action immediate upon the act in question¹.

Lastly, to constitute a trespass to property, the thing affected must be capable of ownership as property; and in some cases it must have been in the plaintiff's possession at the time. Wild animals, untamed, are deemed property only while in one's actual or constructive possession; upon effectual and final escape, they cease to be property so long as they are free. Any one may now kill or take them. Indeed a savage domestic animal straying at large, and dangerous, may be killed, though the owner be known to be in pursuit².

A man may have property in a dog even though the animal may not have any certain pecuniary value³. The same is probably true of rare animals kept for study, for exhibition, for breeding, or even as pets⁴. No one therefore has a right to take these from the owner, or to keep them from him when taken up as strays⁵, or needlessly to kill them⁶. But there are circumstances when the law justifies the killing of another's animals; a man may not only protect himself or another from the attack of a beast, he may kill an animal, in some cases, which is doing mischief, as a dog which is biting or worrying his sheep or other valuable animals or fowls⁷. Indeed, a savage dog suffered to run at large without a muzzle, and disposed to attack or snap at people, may be treated as a nuisance and killed by any one; and that too whether at the time the dog was doing harm or not⁸.

¹ See Chitty, Pleading, i. 166. But quære whether the effect of the rule of trespass ab initio might not be had in some of these cases, as in the third and fourth?

² Kent, Com. ii. 348, 349.

³ *Dodson v. Meek*, 4 Devereux & Battle (North Carolina), 146; *Wheatly v. Harris*, 4 Sneed (Tennessee), 468.

⁴ See *Amory v. Flynn*, 10 Johnson (New York), 102, as to wild animals tamed.

⁵ *Id.*

⁶ *Dodson v. Meek* and *Wheatly v. Harris*, *supra*.

⁷ *King v. Kline*, 6 Barr (Pennsylvania), 318; *Woolf v. Chalker*, 31 Conn. 121.

⁸ *Putnam v. Payne*, 13 Johnson (New York), 312; *Maxwell v. Palmerston*, 21 Wendell (New York), 407.

A man may however keep a ferocious dog as a watch over his premises, if properly secured; while the dog is in such a situation, no one may lawfully kill it, unless indeed it is then making an attack upon man or beast¹. It would doubtless be lawful to kill the dog to save the life even of a burglar.

A word may be added in regard to trespassing animals. The law is very plain and natural; trespassing will seldom justify killing or maiming², or even detaining **Trespassing animals.** upon a claim for anything more than reimbursement of necessary expenses and payment of damage done. And if detained, the animals must be taken care of and properly treated³. On the other hand, if driven away, that must be done without unnecessary violence; unnecessary violence would be a trespass. For example: The defendant, finding the plaintiff's horse straying upon his premises, sets a savage dog upon it, and the horse is seriously hurt. The defendant is liable in damages⁴.

¹ See *Perry v. Phipps*, 10 Iredell (North Carolina), 259.

² See *Aldrich v. Wright*, 53 New Hampshire, 398, an important case, in which a killing was held proper.

³ *Murgoo v. Cogswell*, 1 E. D. Smith (New York), 359.

⁴ *Amick v. O'Hara*, 6 Blackford (Indiana), 258.

CHAPTER XI

CONVERSION

Statement of the duty. *A* owes to *B* the duty not to exercise dominion (1) over *B*'s general property in personal chattels; (2) over *B*'s special property in the like things.

By 'general property' is commonly meant the ownership of property, subject, it may be, to a special property for a time in another.

By 'special property' is meant a right of possession coupled with possession; the right being general, as in the case of a lien creditor, or limited as in the case of a finder.

By 'bare possession' merely is commonly meant a mere custody ('detention') or a possession unlawfully obtained.

Like trespass to property the remedy for this wrong is 'possessory,' in the sense that possession is deemed necessary to the action; but that condition being fulfilled, recovery extends to the value of the property.

The action for converting goods to one's own use has been called 'trover,' a term meaning 'to find,' which was used in the old precedents of declaration; the plaintiff, by a fiction, alleging that he had lost and the defendant had *found* and converted to his own use the chattel in question. This fiction was invented in cases of bailment or the like, to avoid the objection that the defendant had received the goods from the hand of the plaintiff¹. The judges received the allegation accordingly, and

¹ According to the old theory the wrong, like that of trespass, must have been done to the plaintiff's possession (compare ante, p. 205), and hence it was fatal to any action of the kind that the plaintiff had delivered possession to the defendant. If, in respect of possession, the conversion had originally been deemed enough, there would have been no need of the invention of the fiction of loss and finding.

Such common cases as actions for the taking of straying cattle may have suggested the idea of the fiction. See Bigelow's *L. C. Torts*, 422.

did not require proof of it; proof of the conversion therefore was enough.

The action of 'trover' is an action to recover (not specific articles, but) damages for the conversion of chattels personal, to the value of the interest converted.

By an 'act of dominion' is meant an act of, or tantamount to, ownership.

The old action of detinue has not been much used in modern times because of its inconvenience; it requires exact description of the property detained, a thing sometimes difficult to give. Its object is to recover chattels in specie, or damages for their non-return if they cannot be had, and damages for the wrongful detention. It has been superseded largely by trover, which never required such exact description. Detinue too could be defeated, until modern times, by compurgation, while trover could not. Forms of action have indeed been abolished, but the substance of what was required in trover remains in what is required to maintain a suit for conversion.

As in trespass, so in trover, detinue, and replevin, the thing alleged to have been converted must be capable of ownership as property¹.

§ 1. WHAT MUST BE PROVED

<p>Possession and con- version.</p>	<p>The plaintiff is entitled to recover by proving that the defendant took and converted to his own use goods of which the plaintiff was in possession or entitled to take possession at the time of the conversion or because of that act.</p>
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§ 2. POSSESSION

<p>Possession of chattels.</p>	<p>The possession of a chattel personal, that is, of a moveable article, or a right to take possession thereof, is necessary to support an action for conversion, just as it is to support an action for trespass. The plaintiff fails</p>
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¹ See ante, p. 226.

in trover if it appear that he has never acquired a right of possession, or if he has, that he has parted with it, and has not before suit become reinvested with the same. For example: The plaintiff is the purchaser of goods, which however remain in the seller's possession subject to a lien for the purchase price. The defendant, without authority, removes the goods from the seller's possession, doing no permanent injury to them. This is no breach of duty to the plaintiff¹. Again: The defendant, a sheriff, wrongfully levies upon goods of the plaintiff in the hands of a lessee of the property, and carries the goods away. The plaintiff cannot treat the act as a conversion (though the tenant could), since the plaintiff was not entitled to the possession of the property².

On the other hand, the right to the possession of the chattels is sufficient to enable the general owner to sue for a conversion thereof, though he may not have the actual possession at the time of the wrongful act; because, as was stated in the preceding chapter, the right to take possession of goods draws possession in law. For example: The defendant buys and takes away a chattel belonging to the plaintiff from *A*, who has no right to sell it. The plaintiff, being the owner, is deemed to have been in possession of the chattel at the time of the conversion by the defendant³.

A person having 'special property' in goods, with general right of possession, can maintain an action for conversion against **Special property.** all persons who may wrongfully exercise dominion over them though the act be done by command of the owner of the goods. For example: The defendant takes a horse out of the possession of the plaintiff, the plaintiff having a lien upon the animal. The defendant acts by direction of the owner, but without other authority. He is liable for conversion of the horse⁴.

¹ *Lord v. Price*, L. R. 9 Ex. 54.

² *Gordon v. Harper*, 7 T. R. 9. See *Farrant v. Thompson*, 5 B. & Ald. 826; ante, p. 211.

³ *Hyde v. Noble*, 13 New Hampshire, 494; *Clark v. Rideout*, 39 New Hampshire, 238; *Carter v. Kingman*, 103 Mass. 517.

⁴ See *Outcalt v. Durling*, 1 Dutcher (New Jersey), 443. The form of action in this case was trespass, but it might as well have been trover. The injured party could sue in either form in such cases.

It follows that a person having a special property in goods, together with general right of possession of them, may maintain an action against the owner himself for any unpermitted disturbance or refusal of his possession; since, if the owner cannot give an authority to another to take the goods, he cannot take them himself. For example: The defendant, owner of a title-deed, in the possession of the plaintiff under a temporary right to hold it, takes it by permission of the plaintiff for a particular purpose, and then, during the continuance of the plaintiff's right to hold it, refuses to redeliver it. The defendant has violated his duty to the plaintiff, and is liable for conversion¹.

One who has possession of chattels, though without a right to hold them against the owner, is also protected against all persons having neither a right of property nor of possession. The mere fact that the possessor of goods has no right to hold them against persons having a general or higher special property in the goods, gives no privilege to a stranger to interfere with the party's possession. So to interfere would be a breach of duty to the possessor which would render the person interfering liable for the value of the goods. For example: The defendant, a stranger, refuses to return to the plaintiff a jewel, which the latter has found and shown to the defendant. The defendant's act is a breach of duty to the plaintiff, and he is liable for the value of the jewel².

It would be different however if the defendant acted under express authority of the owner, or of one entitled to the possession of the property. But it is laid down that the defendant could not set up the rights of a third person (called the 'jus tertii') without authority from the latter³. That is, the defendant can deny the plaintiff's right only by showing a better right in himself⁴.

¹ *Roberts v. Wyatt*, 2 Taunt. 268.

² *Armory v. Delamirie*, 1 Strange, 505.

³ *Rogers v. Arnold*, 12 Wendell (New York), 30 (suit to recover the chattels specifically); *Jefferies v. Great Western Ry. Co.*, 5 El. & B. 802; *Cheesman v. Exall*, 6 Ex. 341. Does this mean that possession in itself, however obtained, will be protected,—that it cannot be shown e.g. that the plaintiff stole the property? See ante, p. 209, note.

⁴ *Hubbard v. Lyman*, 8 Allen (Mass.), 520; *Landon v. Emmons*, 97 Mass. 37.

The finding of a chattel does not however in all cases give a right to hold the article against all persons having no right of property in it; though the finding and taking possession were not unlawful as against the loser.

Finding.

The chattel may be found upon the premises of another, in such a situation as to indicate that it was voluntarily put in possession of the owner of the premises. When this is the case, the possession of the article is deemed to be in the occupant of the premises, and not in the finder. The former can therefore maintain an action for conversion against the latter should he refuse to surrender to him the chattel. For example: The defendant, a barber, receives from the plaintiff, a customer in his shop, a pocket-book containing money, which the plaintiff has discovered lying upon a table in the defendant's shop. The plaintiff, in handing the pocket-book to the defendant, tells him to keep it until he can discover the owner, and then return it to the loser. No one having called for the article, the plaintiff claims it, and the defendant refuses to give it to him. This is not a breach of duty to the plaintiff, since the fact that the pocket-book was left upon the defendant's table indicates that the owner put it there by intention, and so put it into the defendant's keeping or possession¹.

If however the chattel be found in a position which indicates that it could not have been purposely put there, but must have been unintentionally parted with, and so truly lost the moment it escaped the owner, it does not fall into the keeping or possession of the occupant of the premises unless he (or his servant) first discover it there. If another first find it, the possession, as between himself and the occupant, is in him, the finder². For example: The defendant, a shopkeeper, receives from the plaintiff a parcel, containing bank-notes, which the latter has picked up from the *floor* of the defendant's shop; the plaintiff, on handing the parcel to the defendant, telling him to keep the same till the owner claims it. The defendant advertises the parcel, but no one claims it, and three years having elapsed, the plaintiff requests the defendant to return to him the notes, at the

¹ *McAvoy v. Medina*, 11 Allen (Mass.), 548.

² *South Staffordshire Water Co. v. Sharman*, 1896, 2 Q. B. 44; *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75.

same time tendering the cost of advertising, and even offering an indemnity. The defendant refuses. This is a breach of duty to the plaintiff, and the defendant is liable to him for conversion of the parcel¹.

The term 'possession' has the same meaning here, and indeed everywhere in the law of torts, that it has in cases of trespass². Thus, a servant can, it seems, only hold; the possession is the master's. For example: The defendant takes goods out of the hands of the plaintiff, a sheriff's deputy, without authority. The act is deemed not a breach of duty to the plaintiff, since he is but a servant, and so holds not in his own right³; though it would be otherwise in regard to the sheriff.

Possession
here has the
same meaning
as in trespass.

§ 3. WHAT CONSTITUTES CONVERSION

It has been seen that conversion consists in the exercise of an act of dominion over the moveables of another; that is, it is a usurpation of ownership. It matters not whether this was done with or without knowledge of the true state of the title, as will be seen: every man acts at his peril in exercising dominion over another's property⁴. The distinction between trespass and conversion consists in this, that trespass is an unlawful taking, as for the mere sake of removing the property, while conversion is an unlawful taking or keeping in the exercise, legally considered, of the right of ownership⁵.

Acts of dominion appear in two forms: first, where the wrong-

¹ *Bridges v. Hawkesworth*, *supra*.

² *Ante*, p. 209. The meaning there ascribed to the term is intended to be of the widest application, where the possession is real.

³ *Hampton v. Brown*, 13 Iredell (North Carolina), 18; *ante*, p. 210. But see *Moore v. Robinson*, 2 B. & Ad. 817. And further see *Holmes*, Common Law, 226-228; *Ashwell's Case*, 16 Q. B. D. 190.

⁴ See a qualification stated in *Hollins v. Fowler*, L. R. 7 H. L. 757, 768. Lord Blackburn, in regard to dealing with goods at the request of a person having actual custody of them, in the bona fide belief that such person is owner, or has the owner's authority.

⁵ See *Bushel v. Miller*, 1 Strange, 129; *Fouldes v. Willoughby*, 8 M. & W. 540, 551, Rolfe, B.

doer appropriates to himself the goods of another; secondly, where, without appropriating them to himself, he deprives the owner, or person having the superior right, of their use, by an act of ownership.

The most common illustration of an act of dominion in the first form is the case of a sale and delivery of goods, made without authority of the owner. Every sale without restriction by a person having no right to sell is a conversion, if followed by delivery¹, and renders the vendor liable in an action of trover². For example: The defendant, an officer, levies upon goods as the property of a third person, some of which belong to the plaintiff, takes them away after being informed of the plaintiff's claim, and sells the whole. This is a conversion of the plaintiff's goods; though it would have been otherwise had the goods been mixed by the plaintiff with those of the third person³, and a separation not offered by the plaintiff⁴.

The same consequence follows where, having authority to make a sale, the party selling transgresses his right; since to do so is to assert that he may sell according to his own will, and that is to exclude the rights of all others. For example: The defendant, an officer, makes, unnecessarily, an excessive levy upon the plaintiff's goods, under a valid writ, and sells them. This is a conversion, since it is done in disregard of the defendant's authority, and according to the party's own will⁵.

This principle that the sale of property with delivery is an act of dominion, so as to render the seller liable for conversion if he had no right to sell as he did, applies equally whether the vendor knew or did not know the true state of the title, or the actual limit of his authority. Liability for converting the goods of another to one's own use does not depend upon the intent of the party exercising the act of dominion. For example: The defendant

Ignorance of title: intention.

¹ See *Consolidated Co. v. Curtis*, 1892, 1 Q. B. 495, 498.

² *Quære*, whether a demand would be necessary?

³ *Gilman v. Hill*, 36 New Hampshire, 311.

⁴ See *Kent*, *Conn.* ii. 365.

⁵ *Aldred v. Constable*, 6 Q. B. 370, 381. So to pledge the goods of another without authority. *Carpenter v. Hale*, 8 Gray (Mass.), 157.

sells and delivers a horse of the plaintiff to a third person, the defendant having bought the animal from one who had no title to it, though the defendant supposed the contrary, and supposed himself to be owner of the horse at the time of the sale in question. The defendant is liable for conversion¹.

Where the purchaser's vendor had acquired his supposed title from the plaintiff by means of a sale effected by false, or even by fraudulent, representations, the case would be different. Fraud of this character renders the sale voidable merely, not void; the consequence of which is, that the defrauded party has a right to rescind the sale only so long as the property remains in the hands of the buyer from himself, or of any one claiming under him who is not a purchaser for value without notice². Inasmuch as the buyer, notwithstanding his fraud, acquired the title to the goods, he can convey that title; and more, he can convey a better right than he had himself, provided he sell to a purchaser for value without notice.

Hence, not only would such purchaser be free from liability in refusing to return the goods to the defrauded party, but should that party obtain possession of them and refuse to deliver them to the purchaser from the intermediate seller, he (the defrauded party) would himself be liable in trover. For example: The defendants, having previously been owners of a quantity of iron, sell the same to *P*, who gives them a fraudulent draft (supposed by the defendants to be good) for the amount due for the property. *P* then sells the iron to the plaintiff, who buys for value, and without notice of the fraud. Subsequently, the defendants discover the fraud, and send their servant to take away the iron, now lying in port in a lighter alongside the plaintiff's wharf. The servant takes away the lighter and brings the iron therein to the defendants. The plaintiff has acquired a good title to the iron, and the defendants are guilty of a conversion³.

¹ *Harris v. Saunders*, 2 Strobbart (South Carolina), Eq. 370, note; *Carter v. Kingman*, 103 Mass. 517. See *McCombie v. Davies*, 6 East, 538; *Hilbery v. Hatton*, 33 L. J. Ex. 190; *Fowler v. Hollins*, L. R. 7 Q. B. 616; s. c. 7 H. L. 757.

² *Clough v. Northwestern Ry. Co.*, L. R. 7 Ex. 26.

³ *White v. Garden*, 10 C. B. 919. See for the converse case *Cundy v. Lindsay*, 3 App. Cas. 459.

There are other cases in which a person may by purchase for value and without notice acquire a better right than his vendor had. A purchaser of goods from one who has by the terms of sale reserved the right to buy back the property within a certain time, acquires (or may by such a transaction acquire) the title to the property, and, having a good title, he may convey the same to one who purchases for value and without notice, so as to cut off the original owner's right to repurchase. The consequence is, that the last purchaser is not guilty of a conversion by refusing to let the original owner have the goods upon a tender by him of the amount he was to pay for them, though made within the time agreed upon between him and his buyer. The case would be different however in regard to the buyer from the original owner. His act in making the sale would indeed be lawful against the seller, if the seller should never offer to repurchase: but if the seller should offer to repurchase, and tender the price, his purchaser would be bound to return to him the goods, and, in case of failure, would be liable according to the terms of the contract.

If however the sale were upon condition that the title should not pass until the performance of some act, the party, not having acquired the title, could not convey it; and an attempt to do so by a sale and delivery would, by the better rule, subject the buyer to liability for conversion. For example: The defendants purchase furniture from *W*, who had taken possession of the same upon an agreement with the plaintiff, the owner, that he should keep it six months, and if within that time he should pay a certain sum for it, it should be his; otherwise, he was to pay twenty-five per cent. of the price for the use. The sale to the defendants is made shortly after *W* takes possession of the furniture and before payment for it. A refusal by the defendants to restore the property to the plaintiff is a breach of duty to him, and makes them liable for the value of the furniture¹.

According to recent authorities, the holder of a pledge or pawn has such an interest in the chattel that he can dispose of

¹ *Sargent v. Gile*, 8 New Hampshire, 325, denying *Vincent v. Cornell*, 13 Pickering (Mass.), 294. According to the latter case, the conditional buyer would, by the sale, transfer his own right, such as it was. See *Coggill v. Hartford R. Co.*, 3 Gray (Mass.), 545; *Deshon v. Bigelow*, 8 Gray (Mass.), 159.

the same by sale or repledge without subjecting the purchaser or repledgee to *trover*, and without subjecting himself thereto, except in either case upon a failure to produce the pledge or pawn upon tender of the debt to secure which the chattel was given. For example: The defendant has taken in pledge from *S* certain bonds, which the plaintiff had pledged to *S* for the security of a debt smaller than the amount of the debt of *S* to the defendant; the repledge being made before the maturity of the original debt¹, and before payment or tender thereof. The refusal of the defendant to return the bonds to the plaintiff except on tender to the defendant of the amount due to *S* is not a *conversion* by the defendant; nor would the act of *S* amount to a conversion, unless upon tender of the debt due to him he should fail to return the bonds².

One who has a special property in goods may or may not be able to dispose of his interest therein, according to the nature

of his interest. Not every special property is alienable. In many cases of bailment, the special objects

to be effected forbid that the bailee should have an assignable interest. Such is the case (1) where the bailment is made upon a trust in the personal skill, knowledge, or efficiency of the bailee. Such is the case (2) where the bailee has a mere lien upon the goods intrusted to him. And such is the case (3) where the bailment is at the bailor's will. In any of these cases, any attempt by the bailee to assign his interest in the property, followed by delivery of possession, puts an end at once to the bailment. The consequence is, that the assignee acquires no title or right, and becomes liable on refusing to surrender the goods to the owner, even if not by merely taking them.

There is however a large class of bailments where the trust is accompanied with other incidents than those pertaining to a simple bailment, and where there is no element of personal trust, and none of the characteristics of an estate at will; and in this class it is clear that the bailee has an assignable interest.

¹ That is, while the bonds were still subject to redemption by the plaintiff.

² *Donald v. Suckling*, L. R. 1 Q. B. 585. To pledge, without authority, another's property held in simple bailment would be a very different thing. *Carpenter v. Hale*, 8 Gray (Mass.), 158, *infra*, p. 239. Compare the Roman law. *Lex Aquilia*, fr. 30, § 1; Grueber, pp. 122-125.

There can be no conversion therefore in the act of transferring such an interest merely, provided the assignee claims only the rights of the assignor: because the latter, having exercised no act of dominion over the property, but having dealt simply with his own interest, did not reinvest the owner with a right of possession. An attempt by the bailee to dispose of the goods absolutely however would be different, if followed by a delivery of them. For though a bailee could not, without fault on the part of the owner (by holding him out as having a right to sell absolutely), dispose of anything beyond his own interest, the attempt to do so, followed by the overt act, would be to exercise dominion over the goods¹.

It is not always necessary that there should be an appropriation of the entire property held in order to effect a conversion of the whole. If the part appropriated be necessary to the use of the rest in the purpose to which the whole was to be put, as by rendering an intended sale impracticable except at a sacrifice, the part appropriation, if wrongful, *may*, it seems, be a conversion of the whole. For example: The defendant, a bailee by the plaintiff of wine in casks for sale by the cask, consumes part of the wine in one cask. This may (probably) be treated as a conversion of all the wine in that cask². Again: The defendant finds a raft of timber belonging to the plaintiff lodged on a sandbar in a stream, takes possession of it, hires a man to assist him in removing part of it, and sells the rest to him, reserving the part removed. This may be treated as a conversion of the whole raft³.

It appears to be immaterial to the plaintiff's right of recovery for the whole, that what remains is still in itself as good as if there had been no severance; the plaintiff has the right to the benefit to be obtained from it in its entirety, where that is a special benefit. This principle would apply to cases where separate articles are delivered under one entire contract of bail-

¹ See ante, p. 234; *Lancashire Wagon Co. v. Fitzhugh*, 6 H. & N. 502; *Cooper v. Willomatt*, 1 C. B. 672.

² *Philpott v. Kelley*, 3 Ad. & E. 106, *semble*. The case was not so strong as the facts put in the example. See *Clendon v. Dinneford*, 5 Car. & P. 13; *Gentry v. Madden*, 3 Pike (Arkansas), 127.

³ *Gentry v. Madden*, 3 Pike (Arkansas), 127.

ment or lease, even though the articles be separately enumerated and valued. The bailment or lease is still indivisible in contemplation of law, and conversion of part may be conversion of the whole¹.

If however separate articles be severally bailed or leased, by distinct contracts, though all be delivered and bargained for at the same time, the rule of law is (probably) different; a conversion of one of the articles or parts would not in such a case operate as a conversion of the whole.

If the owner of goods stand by and permit them, without objection, to be sold as the property of another, the purchaser 'Standing by.' acquires a good title, and is not liable to the owner for a refusal to deliver them to him. For example: The defendant purchases machinery of *M*, the legal title to which at the time of the sale is in the plaintiffs. The machinery is sold under a levy of execution against *M*, and the plaintiffs, though having notice of the levy, and having repeatedly conversed about it, before the sale, with the attorney of the party who made the levy, never laid any claim to the property until after the sale. The defendant's refusal to surrender the machinery to the plaintiff is not a breach of duty².

Appropriating an article held in bailment to a use not contemplated at the time of the contract of bailment, and not **Unauthorized use, etc.** authorized by law, may constitute conversion. For example: The defendant hires of the plaintiff a horse to ride to York, and rides it beyond York to Carlisle. This is a conversion of the animal, entitling the plaintiff, on return of the property, at least to nominal damages, and to actual damages if any loss be in fact sustained by reason of the act³. Again: The defendant lends money to *A*, taking from him by way of security a quantity of leather, which had been placed in *A*'s hands by the plaintiff, on hire, to be made up into boots. The defendant refuses to surrender the leather to the plaintiff. He is guilty of conversion⁴. Again: The defendant

¹ See *Clendon v. Dinneford*, 5 Car. & P. 13; *Gentry v. Madden*, supra.

² *Pickard v. Sears*, 2 Ad. & E. 469.

³ *Isaack v. Clark*, 2 Bulst. 306; *Perham v. Coney*, 117 Mass. 102.

⁴ *Carpenter v. Hale*, 8 Gray (Mass.), 157.

receives from the plaintiff shares of stock to be sold on commission. Instead of selling, the defendant exchanges the stock for other property. This is a conversion¹.

It has sometimes been supposed in America that there can be no right of action for conversion in such cases, unless the chattel was injured in the misappropriation². But **Damage to the property.** there is ground for doubting the correctness of this doctrine. The foundation of the action is the usurpation of the owner's right of property. It is true, the plaintiff in trover seeks to recover the value of the thing converted, but if he has received it back, or possibly if it has been tendered back in proper condition³, he will be allowed to recover no more (beyond nominal damages) than the amount of his loss⁴. But conversion itself is a cause of action: it is not necessary to prove special damage.

In all the foregoing cases, it will be observed that there is something more than an assertion, by word of mouth, of dominion over the chattel. An assertion alone, not followed **Assertion of authority not enough.** by any act in pursuance of it, such as a refusal to surrender the chattel to the person entitled to

¹ *Haas v. Damon*, 9 Iowa, 589. The buyer would not be liable if the act was within the general scope of the agent's authority, and without notice of the breach of duty.

² *Johnson v. Weedman*, 4 Scammon (Illinois), 495; *Harvey v. Epes*, 12 Gratton (Virginia), 153. In the first of these cases a horse which the defendant had converted died on his hands, directly after but not in consequence of the conversion. It was held that the owner had no cause of action. The plaintiff was not entitled to recover the value of the horse, but he had a cause of action, it should seem.

³ There is much doubt of the right to tender back the converted chattel, though it has not been injured, especially if the conversion was 'wilful.' See *Hart v. Skinner*, 16 Vermont, 138; *Green v. Sperry*, id. 390. But see *Delano v. Curtis*, 7 Allen (Mass.), 470, 475. Further see *Yale v. Saunders*, 16 Vermont, 243; *Stephens v. Koonce*, 103 North Carolina, 266. The true view of the case appears to be that the party wronged has an election whether to treat the wrong as a conversion or not, and the question then is whether he has exercised his election.

⁴ *Fisher v. Prince*, 3 Burr. 1363; *Earle v. Holderness*, 4 Bing. 462; *Cook v. Hartle*, 8 Car. & P. 568; *Hewes v. Parkman*, 20 Pick. 90, 95. Judgment for the plaintiff in trover does not vest the property in the defendant. *Lovejoy v. Murray*, 3 Wallace (Supreme Court U. S.), 1; *Brady v. Whitney*, 24 Michigan, 154; *Brinsmead v. Harrison*, L. R. 6 C. P. 584.

possession, would not amount to a conversion. There must be some unauthorized interference with the plaintiff's right of possession. Even an attempted exercise of dominion, without right, appears to be insufficient to constitute a conversion, if the owner's right was not in fact interrupted. For example: The defendant, by an officer, makes a declaration of attachment of goods which he knows is already duly levied upon by the plaintiff, has a keeper appointed and then *suffers* the owner of the attached property to take it away and sell it, and receives part of the avails. This is deemed not a conversion¹.

Thus far of cases in which the defendant has appropriated the goods in question to his own use. But, as has been stated, **Conversion to another's use.** a wrongful act of dominion may be committed without so appropriating the goods. It is enough that the defendant has wrongfully deprived the plaintiff of the possession of his goods or usurped his rights over them, though for the benefit of a third person.

In cases of this kind it was formerly supposed that an intention to deprive the plaintiff of his goods was necessary; but this has been decided to be incorrect. The question still is whether there has been a wrongful exercise of dominion by the defendant; if there has been an unauthorized act which deprived the plaintiff of his property permanently or for an indefinite time, there has been a conversion². If not, the contrary is true. For example: The defendant, manager of a ferry, receives on board his boat the plaintiff, with two horses. Before starting, the plaintiff is reported to the defendant as behaving improperly, and though he has paid his fare for transportation, and the defendant tells him that he will not carry the horses, and that they must be taken ashore, the plaintiff refuses to take them off the boat, whereupon the defendant puts them ashore, and has them taken to a livery for keeping. The plaintiff goes with the boat, and the next day sends to the livery stable for his horses. In reply, the plaintiff is told that he can have his horses by

¹ Polley v. Lenox Iron Works, 2 Allen (Mass.), 182, adopting the language of Heath, J., in Bromley v. Coxwell, 2 B. & P. 438, that 'to support an action of trover there must be a positive tortious act.' Here the defendant was merely 'suffered' to take and sell the property.

² Hiort v. Bott, L. R. 9 Ex. 86, 89, Bramwell, B.

coming and paying the charges for keeping, otherwise they will be sold to pay expenses. They are sold accordingly, and damages as for a conversion are sought of the defendant. The action is not maintainable, since there is nothing to show that the defendant wrongfully deprived the plaintiff, even for a moment, of his property¹.

Any asportation of a chattel however *for the use* of a third person amounts to a conversion, for the reason that the act is inconsistent with the right of dominion which the owner (or person entitled to possession) has in it². And the same is true of an intentional, or possibly negligent, destruction of the chattel³.

In the case of acts of co-owners (cotenants) it is held that nothing short of a substantial destruction of the common property by the wrongful act of one of them can make him **Cotenancy.** liable to the other or others for conversion⁴. This is on the ground that each of the common owners has a right to the entire possession and use of the property. A sale and delivery, though absolute, would not be enough; for the purchaser would only become a co-owner with the others⁵; though many American cases hold the contrary⁶. Indeed some American cases treat the mere withholding of the chattel by a cotenant from his fellow, or the misuse of it, or the refusal to sever and terminate the cotenancy, as a conversion⁷. But it is not necessary by any of the authorities that there should be a physical destruction of the property, as by breaking it in pieces; enough that the common interest, or rather the plaintiff's interest, is practically destroyed, as by a sale by the cotenant and

¹ *Fouldes v. Willoughby*, 8 M. & W. 540. For other examples see *Simmons v. Lillystone*, 8 Ex. 431; *Thorogood v. Robinson*, 6 Q. B. 769.

² *Fouldes v. Willoughby*, *supra*.

³ *Id.*

⁴ *Farrar v. Beswick*, 1 M. & W. 682, 688, Parke, B.; *Morgan v. Marquis*, 9 Ex. 145; *Mayhew v. Herrick*, 7 C. B. 229. Compare the case of trespass, *ante*, pp. 213, 215.

⁵ *Morgan v. Marquis*, *supra*, Parke, B.

⁶ *Weld v. Oliver*, 21 Pickering (Mass.), 559; *Wilson v. Read*, 3 Johnson (New York), 175; *Dyckman v. Valiente*, 42 N. Y. 549; *White v. Brooks*, 43 New Hampshire, 402; *Dain v. Coning*, 22 Maine, 347.

⁷ *Agnew v. Johnson*, 17 Penn. St. 373; *Fiquet v. Allison*, 12 Michigan, 328. See *Strickland v. Parker*, 54 Maine, 263.

the buyer's taking the property beyond the State, there to be kept¹.

If an act in and of itself a conversion has been committed, the injured party is entitled to bring suit without first **Demand and refusal.** demanding his property. In other cases, a demand and wrongful refusal will be necessary, since without them there has been no wrongful exercise of dominion². For example: The defendant collusively purchases goods from a trader on the eve of the trader's bankruptcy, and takes the property into his own possession. The assignee of the trader brings trover without a demand. The action is not maintainable, since the defendant had been guilty of no conversion; the trader being competent to contract, though his contract of sale was liable to impeachment³.

Of the last example, it should be observed that (in accordance with a principle already stated) the fraud of the trader and the defendant did not make the sale void: its only effect was to render it voidable. The contract was therefore binding until disaffirmed; and a disaffirmance could be made only by a demand of the goods, or by some act tantamount thereto. And the demand and refusal, that is, the conversion, must be apart from the bringing of suit, when such acts are necessary; for the cause of action must have arisen before suit was begun. In the example given if the defendant had sold the goods, or improperly detained them after a disaffirmance of the sale, the action would have been maintainable⁴.

Whether a demand is necessary where property has been sold and delivered by one having no power to sell, has in America been a point of conflict of authority. The better view however is that the unauthorized sale and delivery are sufficient to constitute a conversion, and hence that demand before suit is not necessary⁵. It is conceded that if the buyer has *taken* the goods away, there is a conversion by him⁶.

¹ *Pitt v. Petway*, 12 Iredell (North Carolina), 69.

² Chitty, Pleading, i. 157; *Nixon v. Jenkins*, 2 H. Black. 135.

³ *Nixon v. Jenkins*, supra.

⁴ *Bloxam v. Hubbard*, 5 East, 407.

⁵ *Galvin v. Bacon*, 2 Fairfield (Maine), 28; *Stanley v. Gaylord*, 1 Cushing (Mass.), 536; *Trudo v. Anderson*, 10 Michigan, 357. Contra, *Marshall v. Davis*, 1 Wendell (New York), 109; *Barrett v. Warren*, 3 Hill (New York), 348; *Talmadge v. Scudder*, 38 Penn. St. 517.

⁶ *Ely v. Ehle*, 3 Comstock (New York), 506; *Marshall v. Davis*, supra.

A very common instance of the necessity of demand and refusal is where goods have been put into the hands of another for a special purpose, upon agreement to return them when the purpose is accomplished; in regard to which the rule is, that a breach of the contract by the mere failure so to return the goods does not amount to a conversion. Before the bailee can be liable in trover in such a case, supposing there had been no misappropriation or other act of dominion, there must be a demand for the goods and a refusal to restore them¹. An unqualified refusal will itself, in almost all cases, constitute a conversion².

A qualified refusal to deliver goods on lawful demand may however be only *prima facie* evidence of a conversion³. The defendant may have found the goods, and refused to surrender them to the plaintiff until he shall have proved his right to them. It follows from what has already been said that such a refusal is justifiable, since, if the plaintiff is not entitled to the goods by right, the defendant as finder has the better claim; and he cannot or may not know that the plaintiff may not be a pretender until he has furnished evidence that he is not. And other cases of the kind might be stated⁴; the only question, where the refusal to return is qualified, is whether it is reasonable⁵.

If the demand be not made upon the defendant himself, but merely left at his house in his absence, it seems that a reasonable time and opportunity to restore the goods should be suffered to elapse before the defendant's non-compliance with the demand can be treated as a refusal amounting to a conversion. Non-compliance with the demand, after a reasonable opportunity has been afforded to obey it, is however clearly tantamount to a refusal, and is presumptive evidence of a conversion, thus requiring the defendant to explain that the omission to deliver the goods was justifiable⁶.

¹ *Severin v. Keppell*, 4 Esp. 156.

² *Alexander v. Southey*, 5 B. & Ald. 247, 250.

³ *Burroughes v. Bayne*, 5 H. & N. 296; *Alexander v. Southey*, *supra*.

⁴ See *Pollock, Torts*, 343, 344, 6th ed.

⁵ *Alexander v. Southey*, 5 B. & Ald. at p. 250.

⁶ *Chitty, Pleading*, i. 160; *Thompson v. Rose*, 16 Connecticut, 71.

CHAPTER XII

INFRINGEMENT OF PATENTS, TRADE MARKS, AND COPYRIGHTS

Statement of the duty. *A* owes to *B* the duty (1) to forbear 'working or making,' without *B*'s license, anything patented by *B*; (2) to forbear to use *B*'s trade mark, or one so resembling it as to be apt to deceive; (3) to forbear to print for sale or exportation, or to import for sale or hire, any book of which *B* owns the copyright, without *B*'s written consent, or knowing the same to have been so printed or imported, to sell, publish or expose or keep for sale or hire, without such consent, any such book¹.

The word 'book' (or its equivalent) is to be taken to include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published².

Whether a particular act is an infringement of letters patent, or of a copyright, will depend upon the answer to two questions; what is the nature and extent of the right alleged to be infringed? and what is the nature of the act complained of? It has not been necessary heretofore to deal much with the nature of the plaintiff's right, since it has generally been obvious enough what it was; and attention has accordingly been drawn mainly to the conduct of the defendant. Now, however, the plaintiff's right, whether in a matter of patent or of copyright, is peculiar, and some attention must be given to that side of the subject; though matters of detail, both in regard to the nature of the right and of the defendant's conduct, must be left for special treatises upon the respective subjects.

¹ The statutes are too prolix for further statement here.

² As in 5 & 6 Vict. c. 45, the general Copyright Act.

§ 1. PATENTS FOR INVENTION

A statute of the reign of James the First, aimed at monopolies and declaring them illegal, contains a saving clause in regard to letters patent, which forms the basis of the present law of patents for invention, and has never been essentially changed. The statute saves from the general condemnation and makes lawful 'letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the first and true inventor or inventors of such manufactures, which others at the time of the making of such letters patent and grants shall not use, so as they be not contrary to the law or mischievous to the state¹.'

This and subsequent statutes contain many provisions more or less minute concerning the steps to be taken to secure the benefit of such letters patent; and there are statutes of amendment in regard to matters which cannot be set out here; there are also statutes extending, in certain cases, the term of the letters for seven and in exceptional cases for fourteen years²; and finally there is a recent general revision of all the statutes on the subject³.

Among the matters of chief importance in the steps necessary to acquire the right is the making out and sending to the Patent Office, with the application for the patent, a specification of the invention, with a short statement of the claim of the inventor at the end. The law provides for two specifications, a provisional and a complete one; though the former need not be made. It is important to understand the purposes of the two, and the distinctions between them.

The provisional specification is supposed to be drawn up before

¹ 21 Jac. 1, c. 3.

² 46 & 47 Vict. c. 57, § 25.

³ The statutes in order are 5 & 6 Wm. 4, c. 83 (in regard to disclaimers or memorandum of alterations, and providing a penalty for unauthorized use of patentee's name, or counterfeit of his stamp inter alia); 2 & 3 Vict. c. 67 (extending period in certain cases for seven years); 7 & 8 Vict. c. 69 (same for fourteen years); 15 & 16 Vict. c. 83 (Patent Law Amendment Act of 1852); 16 & 17 Vict. c. 115 (amending Act last named); 46 & 47 Vict. c. 57 (general revision of the statutes).

the inventor has fully perfected the details of his invention. It should describe generally and fairly the nature of the invention, with drawings if required, so that the invention may be understood; it need not enter into all the details in regard to the manner of carrying out the same¹. Its purpose is only to protect the inventor until the description can be perfected in the complete specification; it is not made public, unless with that specification². Indeed, if allowed by the law officer of the Crown, the earlier description cannot be impeached as too general³.

The test of the sufficiency of any specification is laid down to lie in this, whether it would enable an ordinary workman, exercising the knowledge common to the trade, to make the machine. 'It need not give every detail, but it must not tax invention⁴.' That is, if a workman of ordinary skill would not be able to construct a machine from the description, without a series of experiments, the specification is insufficient⁵.

The complete specification is of course a different thing from the provisional one. Unlike that, it must particularly describe and ascertain the nature of the invention and the manner in which it is to operate; and, as in the case of a provisional specification, it must also be accompanied by drawings if required⁶. The omission in either specification to mention anything which may be necessary for the beneficial enjoyment of the invention would be fatal; though this would not be the case if the thing omitted go only to the degree of such enjoyment⁷.

The complete specification should not claim anything differing in substance from that contained in the earlier one; but on the other hand it need not extend to everything described there. Part of the earlier may, as has been said, be omitted altogether; or where the facts have been sufficiently described in the pro-

¹ *In re Newall*, 4 C. B. N. S. 269, 293, Byles, J.; *Stoner v. Todd*, 4 Ch. D. 58, Jessel, M. R.

² *Stoner v. Todd*, *supra*.

³ *Penn v. Bibby*, L. R. 2 Ch. 127.

⁴ *Plimpton v. Malcolmson*, 3 Ch. D. 531, Jessel, M. R.

⁵ *Wegmann v. Corcoran*, 13 Ch. Div. 65.

⁶ § 5; *In re Newall*, 4 C. B. N. S. 269, 293.

⁷ *Neilson v. Harford*, 8 M. & W. 806.

visional specification for the purpose of a final one, the prior description may be referred to, without repeating it¹.

The rule concerning the final specification is, however, rigid. It must be free from all untrue statement, even such as may appear only upon a literal reading. If it contain an untrue statement such as, if literally acted upon, would mislead a competent workman, it is bad; and this though a competent workman would correct the error in practice². For example: The plaintiff's specification, grammatically construed, claims to effect a particular result by two processes, one of which will not effect it. A skilled workman would not be misled, but would adopt the right process. The patent granted thereon is invalid³.

The meaning of the specification should be clearly expressed; it should not be ambiguous, or it will be bad for the purpose of the patent⁴. For example: The plaintiff files a specification for the construction of a windlass, stating the object to be 'to hold, without slipping, a chain cable of any size.' Constructions are known before the date of the patent, by which windlasses might be made to hold a single chain cable of any size. The specification does not unequivocally show that the object is to construct a single windlass which might hold different chain cables whatever their size, and is bad⁵.

But while the rule is much more exacting in regard to the final than in regard to the earlier specification, it is not unreasonable; and slight variations not touching anything of substance, or tending to mislead or to experimenting, will not be fatal. For example: The plaintiff makes a preliminary specification for a patent relating to sewing-machines, which describes an instrument of the patent, and then says that 'this, or another acting therewith, acts to hold the work during the insertion of the needle.' The final specification describes only one instrument as so holding the work. The variance is not sufficient to defeat the letters patent granted thereon⁶.

It matters not, either, that the specification may include an

¹ *Penn v. Bibby*, L. R. 2 Ch. 127.

² *Neilson v. Harford*, 8 M. & W. 806, Parke, B.

³ *Simpson v. Holliday*, L. R. 1 H. L. 315.

⁴ *Turner v. Winter*, 1 T. R. 602; *Hastings v. Brown*, 1 El. & B. 450.

⁵ *Hastings v. Brown*, *supra*.

⁶ *Thomas v. Welch*, L. R. 1 C. P. 192.

invention not new, if, omitting that, there is still enough left to constitute the ground for a patent¹.

Further, however perfect may be the specifications in point of description, there is no valid patent of course unless the plaintiff is 'the first and true inventor.' And what this means is to be found, not necessarily in the meaning which might naturally be attached to the words, but in that meaning which the courts have given to it².

What this meaning is may be indicated by the language of a distinguished Master of the Rolls³. The learned judge said in substance that shortly after the first statute concerning patents, the question arose whether a man could be called a first and true inventor who in the popular sense had not invented anything, but who, having learned in some foreign country that some one had invented something, copied the invention, brought it to England, and took out a patent. It was held that he was a first and true inventor within the meaning of the statute, if the invention, being in other respects novel and useful, was not previously known in England as part of the common knowledge of the country.

Then, as the Master of the Rolls proceeded to say, this case arose: There were two people, actual inventors in England, who invented the same thing simultaneously; and the question was, whether either could be considered as the first and true inventor. The decision was that he was the first and true inventor who first took out the patent. And then this question arose: If the man who took out the patent was not, in popular language, the first and true inventor, because some one had invented the thing before, but had not taken out a patent for it, would he still be protected? It was decided that he would, provided the invention of the first inventor had been kept secret, that is, had not been made known in such a way as to become part of the common knowledge or of the public stock of information.

The common knowledge then of the country is the test by which the question of novelty is to be applied. This obviously

¹ *Frearson v. Loe*, 9 Ch. D. 48, Jessel, M. R.

² See an article in the *Law Quarterly Review*, July, 1902, p. 280, on the History of Patent Law in the Seventeenth and Eighteenth Centuries, by E. Wyndham Hulme, treating of novelty.

³ Sir George Jessel in *Plimpton v. Malcolmson*, 3 Ch. D. 531, 551.

does not mean that every one must know the principle of the supposed invention. What is meant, as the same judge said, is that if the thing is a manufacture connected with a particular trade, the people in that trade shall know something about it. Nor indeed need the case go so far as that. It is not necessary that the bulk, or even a large number, of those people know the fact; if the fact be so communicated that a sufficient number may be presumed or assumed to know it, that is enough to defeat the patent.

The fact may thus be communicated in different ways; one way is by publishing it in a specification enrolled in the Patent Office; another is by printing the description in a book published and circulated in England. But

Publication. the question of publication will even then turn upon the facts in the case. The mere fact that a book published in a foreign country, and containing a brief description of the invention, is found in England, is not enough. For example: The plaintiff, a citizen of the United States of America, obtains in 1865 letters patent in England for improvements in making skates. Two years before, an American book containing a brief description of the invention had been sent to the (English) Patent Office; and so had a book of drawings, containing a drawing of it, five weeks before the patent was here issued. This is not such a publication as to render the patent invalid¹.

The enrolling of the preliminary specification in the Patent Office may not amount to a publication so as to bar a claim for novelty, where part of it (or perhaps the whole) contains an incomplete and insufficient description of an invention. For example: The plaintiff enrols in the Patent Office a preliminary specification which contains an incomplete description of a patent; and that part is afterwards omitted in the final specification. Subsequently the plaintiff obtains a separate patent in respect of such part; and afterwards the defendant makes for sale an article on the principle of such patent. This is a breach of duty, the first description not being a publication².

¹ *Plimpton v. Malcolmson*, supra, a case of the greatest value.

² *Stoner v. Todd*, 4 Ch. D. 58. See also *Oxley v. Holden*, 8 C. B. N. s. 666, as to the effect of abandoning a former specification. And as to want of sufficient description in the preliminary specification see *United Telephone Co. v. Harrison*, 21 Ch. D. 720.

That for which the laws give patents is 'invention,' something, that is to say, which is *created* by original thought,

'**Invention**': not something which is discovered except in the
'**discovery**': narrower sense of discovery. When therefore the
'**principle**.' word 'discovery' is used of something patented, it

must be understood in the sense of 'invention.' The laws of nature may be discovered by man, but they cannot be invented by him; hence discovery of them cannot be patented¹. 'Principle' or 'scientific principle' is often used in this sense of a law of nature, and in *that* sense falls without the patent laws.

Invention may cover processes however in which any of the laws of nature are called into use; but it is the process (or 'principle' or 'discovery' in that sense) that is patentable, not the law of nature, though that law may never have been known before. And then with regard to processes, it is not processes generally that may be patented. A merely mechanical process, or rather the effect produced by such a process, cannot be patented; or as the law has been laid down from the Bench, 'a man cannot have a patent for the function of a machine²,' for that would be to prevent the use of better machines for performing the same function or attaining the same result³. The processes necessary for making the machine may be patented, not the effect or result to be produced (except with reference to patents for designs). In a word, those processes are patentable which look to results which are to be produced otherwise than by any particular machine or by means not purely mechanical⁴.

Thus far of the creation, acquisition and retention of a patent right; it remains to consider what will give the plaintiff a right of action, assuming the existence of the fundamental right. That is, assuming that the plaintiff has a valid patent, the question remaining relates to the act of the defendant as constituting the alleged infringement.

The statute gives to the owner of the patent liberty 'of the

¹ Telephone Cases, 126 U. S. 531; O'Reilly v. Morse, 15 Howard (Supreme Court U. S.), 112; Walker, Patents, § 2, 2nd ed.

² Corning v. Burden, 15 Howard (Supreme Court U. S.), 252, 268. ³ Id.

⁴ Walker, § 6; Mowry v. Whitney, 14 Wallace (Supreme Court U. S.) 620; Tilghman v. Proctor, 102 U. S. 707; Telephone Cases, 126 U. S. 531.

sole working or making' of the manufacture. This prevents all manner of 'user' in the legal sense; but it does not prevent all manner of making the patented thing by others. Patents, it has been forcibly declared from the Bench, are not granted to prevent men of ingenuity from exercising their talents in a fair way. The mere making for the honest purpose of experiment, without any view of using or vending for profit, is not forbidden; it matters not that the article so made was made with a view to improving upon the patent, or with a view to see whether an improvement can be made,—that would not be an infringement¹. Indeed, the mere exhibition of an improvement is not a user; but to expose the imitation for sale would be an infringement, though no sale was made². And it matters not in this or any other case whether the defendant knew of the existence of the plaintiff's patent³.

Where the patent consists, as it may, of a combination of things, an infringement of it must be an infringement of the combination as such; it would not be infringed by **Combination.** using some of the parts of the combination if they are not themselves patented⁴. Nor in the like case would it be an infringement to use a combination of some of the parts, less than what would be substantially necessary to constitute the subject of the patent, the combination⁵. Indeed it is held that a patent for an entire combination will not be infringed by the use of a different combination, for the same object, of the same elements, if there is no colourable evasion or imitation of the patent⁶.

But where a patent consists of and covers several parts, to imitate any one of them would be an infringement⁷. For example: The plaintiff has a patent for an improved carriage wheel; the specification stating that 'said improved wheel is manufactured wholly of bar iron, by welding iron bars together into the form of a wheel, whereof the nave, spokes, and rim,

¹ *Frearson v. Loe*, 9 Ch. D. 48, Jessel, M. R.

² *Oxley v. Holden*, 8 C. B. N. S. 666.

³ *Stead v. Anderson*, 4 C. B. 806.

⁴ *Dudgeon v. Thomson*, 3 App. Cas. 34.

⁵ *Clark v. Adie*, 2 App. Cas. 315.

⁶ *Curtis v. Platt*, 35 L. J. Ch. 852, H. L.

⁷ *Electric Tel. Co. v. Brett*, 10 C. B. 838; *Smith v. Northwestern Ry. Co.*, 2 El. & B. 69.

when finished, will consist of one solid piece of malleable iron. And the mode whereby the said bars of malleable iron are finished and united into the shape of a wheel is as follows': The specification then shows by drawings how the main spoke and rim are formed and then welded into a wheel of one piece of malleable iron. The 'claim' states that the invention consists in the centre boss or nave, arms, and rim of the wheel being wholly composed of wrought or malleable iron, 'welded into one solid mass in manner hereinbefore described.' The defendant's wheel imitates the manner of forming the boss or nave into one piece of malleable iron with the rest of the wheel, but does not use the same mode with regard to the spokes and rim as the plaintiff's specification describes. The defendant is liable; the claim really being for the invention of the wheel as described, and the defendant's act, being an imitation of the mode of welding the nave, is an infringement of a material part of the patent¹.

Different processes, further, may be employed for reaching the same result; and the patenting of one process will not

Processes. exclude the use by others of a different one, where the result to be reached is a known result². So

where one has obtained a patent for the use of a known substance, described by its own name, if it is afterwards discovered that the use of other known substances will produce the same effect, the use of them will not constitute an infringement of the patent; and this though the testimony of men of science may go to show that the substances in question become, in the act of so using them, the one substance described in the patent³.

An infringement is also committed, though, besides being equivalent to the thing patented, the later article accomplishes

Other advantages. some other advantage beyond that effected by the patented article. The new article is still an in-

fringement, so far as it covers the object of the patent. For example: The defendant, for the purpose of giving signals by telegraph, uses the earth for effecting a return circuit; the plaintiffs having a patent for giving signals by means of electric

¹ *Smith v. Northwestern Ry. Co.*, 2 El. & B. 69.

² *Badische Anilin Fabrik v. Levinstein*, 24 Ch. D. 156; *Bovill v. Pimm*, 11 Ex. 718.

³ *Unwin v. Heath*, 5 H. L. Cas. 505.

currents transmitted through *metallic currents*. The machinery, aside from the return circuit, used by the defendant is the same as that covered by the plaintiff's patent, and is used without license. The defendant is liable, though the use of the earth for effecting a return circuit is an improvement in the art of telegraphing¹.

Where, however, the means employed in the later article are different, not merely in form, but in substance, and consist in combinations differing in substance, there is no infringement, though the object be to produce the same result. For example: The defendant constructs a machine for obtaining a current of air between the grinding surfaces of millstones, by means of a rotating vane, for effecting which the plaintiff also has a machine, protected by patent. The plan of the defendant is to remove from the centre of both stones a large circular portion, and in this space, opposite the opening between the two stones, to place a fan, by the rapid rotation of which a centrifugal motion is given to the air, driving it between the stones. The plan of the plaintiff consists of a portable ventilating machine, blowing by a screw vane, which causes a current of air parallel to the axis of the vane, being attached externally to the eye of the upper millstone; and the screw vane being thus set in rapid motion, the air is forced through the eye into the centre of the stones, and so finds its way out again. The defendant's machine is not an infringement upon the plaintiff's².

§ 2. TRADE MARKS

The law relating to trade marks has been changing its point of view, if not its grounds, in recent times, and becoming, as has been observed in another place³, assimilated to the law of property⁴. The old mode of suing for deceit is accordingly falling into disuse. But the law has not advanced and is not likely to advance to the point of assimilating the law

**Change of
point of view.**

¹ Electric Tel. Co. v. Brett, 10 C. B. 838.

² Bovill v. Pimm, 11 Ex. 718.

³ Ante, p. 76, note.

⁴ See 46 & 47 Vict. c. 57, §§ 62 et seq.

of trade marks so far with the law of property (as e.g. the law of patents) that, for the purpose of recovering damages in a case in which there is no property-right in the plaintiff's mark, the old authorities, which make such a case an action for deceit, are no longer law. Now however the subject for consideration is the kind of trade mark in which one has a property-right, perfect in itself.

The law of trade marks as a right of property, as distinguished from the common-law right to recover damages for fraud though no trade mark as a right in itself existed, is a matter of statute¹. Accordingly, to find out what constitutes a trade mark proper, as in itself a property-right, the statutes and the numerous decisions thereon must be examined. And when that question is answered it will still be a question either of the statute or of the unwritten law whether the right has been violated, or so far threatened as to justify interference by the courts.

The decisions turn largely on particulars too fine for a general work on torts. It must suffice to say, in regard to the first question, that a trade mark under the statute must contain at least one of the following particulars: 1) A name of an individual or firm printed, impressed or woven in some special and distinctive manner; 2) or a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; 3) or a distinctive device, mark, brand, heading, label, ticket or fancy word or words not in common use. There may be added any letters, words or figures, or combination thereof². In regard to the question whether the right has been violated, this is generally a question of resemblance, the same in effect as if the mark were only a quasi or common-law trade mark³. Fraud need not be proved.

§ 3. COPYRIGHTS

Statute provides in substance that the copyright in every book published in the author's lifetime shall endure for the natural life of the author and seven years thereafter, and shall be the property of the author and

Statute.

¹ 46 & 47 Vict. c. 57, §§ 62 et seq.

² Id. § 64.

³ Ante, pp. 75-77.

*1 & 2 for the purposes
of the Statutory Right*

his assigns, provided that if the seven years expire before the end of forty-two years from first publication the copyright shall endure for forty-two years; and that the copyright in every book published after the author's death shall endure for forty-two years¹.

It is also provided that if any person shall in any part of the British dominions print or cause to be printed, either for sale or exportation, any book in which there shall be a copyright, without the proprietor's consent in writing, or shall import for sale or hire any such book, so unlawfully printed beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire any such book, without the proprietor's consent in writing, such offender shall be liable to a special action on the case at the suit of the proprietor of the copyright, in any court of record in that part of the British dominions in which the offence shall be committed².

Among many other provisions penalties are fixed for unlawful importing for sale or hire of books the subject of copyright³; copyright in encyclopædias, reviews, magazines, periodicals, and works published in a series is provided for⁴; the provisions of earlier law are extended to musical compositions; and the term of copyright for books applied to the liberty of representing dramatic pieces and musical compositions⁵. Pirated books are to become the property of the proprietor of the copyright⁶; but no suit is to be brought before entry of the title of the subject of copyright in the Book of Registry at Stationers' Hall⁷.

It is enacted in a later statute that the author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, or photograph shall have the exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative of the same, for the term of the author's life and seven years thereafter; provided that when any painting, drawing, or the negative of any photograph shall

¹ 5 & 6 Vict. c. 45, § 3.

² Id. § 15.

³ Id. § 17.

⁴ Id. § 18.

⁵ Id. § 20.

⁶ Id. § 23.

⁷ Id.

first be sold or disposed of, or shall be made for or in behalf of any other person for a good and valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof unless it be expressly reserved to him at the time by agreement in writing signed by the vendee or assignee of such painting, drawing, or negative of photograph, but the copyright shall belong to the vendee or assignee, or to the person for or on whose behalf the same shall have been made; nor shall such vendee or assignee be entitled to any such copyright unless an agreement at the time in writing shall have been made to that effect¹.

This statute further fixes penalties for infringement of the copyright of the author of any painting, drawing, or photograph², and for fraudulent productions and sales of the same³, and also gives an action for damages to the author⁴.

The statute also provides with minuteness of detail the steps necessary to be taken to secure the particular kind of copyright.

**Copyright a
creation of
statute.**

These cannot be entered into here. It must suffice to say that, whatever doubts once may have existed, copyright has been determined to be a creature of statute, and hence that the author's right must stand or fall accordingly⁵; he cannot claim copyright, in the proper sense, if he has not complied with the statutes. But he may claim protection at common law against wrongful publication by others of his manuscripts, class-room lectures, and the like not printed and published by him⁶. So a painter or a buyer from him has, before publication of the work, a right to protection against others copying it⁷.

It should be noticed, however, that the requirement of registration of title is intended only as a necessary preliminary to bringing suit, and not as a condition to the existence of copyright; hence it need not be attended to at the time of taking out the copyright. It matters

Registration.

¹ 25 & 26 Vict. c. 68, § 1.

² Id. § 6.

³ Id. § 7.

⁴ Id. § 11.

⁵ *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Millar v. Taylor*, 4 Burr. 2303, leading case.

⁶ *Albert v. Strange*, 1 Macn. & G. 25; *Caird v. Sime*, 12 App. Cas. 326. As to 'lecture,' see the last case. at pp. 337, 338.

⁷ *Turner v. Robinson*, 10 Ir. Ch. R. 121, 510.

not, indeed, that the plaintiff has not registered his title at the time of the infringement; enough that it is done before suit¹. On the other hand a man cannot obtain a copyright before publishing his book by getting the title of it duly registered².

The next question to arise is, in what the plaintiff may have copyright, where the language of the statute does not exclude **What may be copyrighted.** all question; though this question cannot be considered in detail. Indeed, it cannot be considered even in lines of broad principle, for want of means of generalization, beyond this, that real and original mental labour must have been bestowed upon the work in question. The rules laid down by the courts are in the main special, and it must suffice to present only some of the more important of them, with such illustrations as may be needed.

Copyright may be had in the title of a book, if that be a material part of the same; though as a general rule the title to a book, not being in any way new or peculiar, is **Examples.** not a subject of copyright³. For example: The plaintiff publishes a book entitled 'Post Office Directory' for a certain locality; and he has taken the steps required for obtaining a copyright. The defendant afterwards publishes a book with the same title. This is no breach of duty to the plaintiff⁴.

A man may have copyright in a newspaper⁵; he may have copyright in the product of his brain in the preparation even of a calendar or a catalogue,—unless the same consist in a mere dry list of names⁶,—especially in an illustrated catalogue. For example: The plaintiffs, upholsterers, have engraved, from original drawings procured by them from artists, and publish under the copyright laws an illustrated catalogue of their wares; the catalogue containing, however, no letterpress which might be the subject of copyright. The defendants publish a catalogue containing drawings copied from those of the plaintiffs. This

¹ *Goubaud v. Wallace*, 36 L. T. N. S. 704.

² *Maxwell v. Hogg*, L. R. 2 Ch. 307.

³ *Dicks v. Yates*, 18 Ch. Div. 76. See *Jarrold v. Houlston*, 3 Kay & J. 708.

⁴ *Kelly v. Byles*, 13 Ch. Div. 682.

⁵ *Walter v. Howe*, 17 Ch. Div. 708.

⁶ *Matthewson v. Stockdale*, 12 Ves. 270; *Longman v. Winchester*, 16 Ves. 269; *Hotten v. Arthur*, 1 H. & M. 603; *Maple v. Junior Army Stores*, 21 Ch. Div. 369.

is a breach of duty; it does not matter that the catalogue is of things for sale¹.

A man may be an 'author,' in the sense of the statute, of a verbatim report of another's public lectures²; a man may have copyright in an arrangement of questions and answers in some general work, if the arrangement is the product of real mental labour³; he may have copyright in a book of selections and compilations from other books the copyright of which he has not thereby infringed, especially where he has added original work to the same⁴, as by comment or other additions⁵, or perhaps by mere arrangement of the materials⁶. A dictionary of quotations would afford an illustration. But of course no copyright could be obtained in such a case in the individual selections themselves⁷; nor will it help the case that labour has been expended upon statements made in quoted matter in the way of verifying them⁸.

Copyright may be had in a translation of a book into a foreign tongue⁹, if the right of translation has not been reserved, though the author himself has translated his book¹⁰;

Translations.

but not in a retranslation, i.e. a translation back again to English¹¹. It may be had also in the dramatization of another man's novel, though the author himself has dramatized the same¹². So in the pianoforte score of an opera, whether arranged by the author or not¹³; and it is held that to unite words to an old air and procure an accompaniment thereto,

¹ *Maple v. Junior Army Stores*, supra, overruling *Cobbett v. Woodward*, L. R. 14 Eq. 407.

² *Walter v. Lane*, 1900, A. C. 539. As to class-room lectures see *Caird v. Sime*, 12 App. Cas. 326, deciding there is a common-law protection in favour of the lecturer against unauthorized publication. See also *Walter v. Lane*, at p. 547.

³ *Jarrold v. Houlston*, 3 Kay & J. 708. See this case for limitations of the rule.

⁴ *Lewis v. Fullarton*, 2 Beav. 6; *Spiers v. Brown*, 6 W. R. 352.

⁵ These themselves would be the subject of copyright. *Cary v. Longman*, 1 East, 358.

⁶ *Barfield v. Nicholson*, 2 Sim. & S. 1.

⁷ Id.

⁸ *Morris v. Ashbee*, L. R. 7 Eq. 34.

⁹ *Wyatt v. Barnard*, 3 Ves. & B. 77.

¹⁰ *Semble*. So held in America. *Stowe v. Thomas*, 2 Wallace, C. C. 547.

¹¹ *Murray v. Bogue*, 1 Drew. 353.

¹² *Toole v. Young*, L. R. 9 Q. B. 523.

¹³ *Wood v. Boosey*, L. R. 3 Q. B. 223, Ex. Ch.

publishing them together, will entitle one to a copyright in the whole¹.

Head-notes or marginal notes to the decisions of the judges are also proper subjects of copyright²; and so are products of mental labour worked out of sources of general and common information³. Indeed, the case of maps, charts, and the like, falls within the very terms of the statute.

The plaintiff will lose his benefit of copyright by giving his book to the public, that is, ordinarily, by putting it upon the market for sale⁴, before taking the steps required by the statute for securing a title. Dramatic and musical compositions, however, stand upon a different footing from ordinary books. It is held that to publish such a composition in England before representing or performing it will not deprive the author of the exclusive right, under the statute, of representing or performing it⁵; but the contrary is held if it was first represented or performed abroad⁶.

Thus far of the plaintiff's title; assuming this now to exist, the remaining question is whether the defendant has infringed it.

To the author of copyrighted matter belongs the exclusive right to take all the profits of publication which the sale of the copyrighted matter may produce. And the author's exclusive right extends to the whole copy, and, in a sense, to every part of it. An infringement of a man's copyright may then be committed (1) by reprinting the whole copy, verbatim; (2) by reprinting, verbatim, a part of it; (3) by imitating the whole or a part, or by reproducing the whole or a part with colourable alterations or disguises, intended to give it the character of a new work; (4) by reproducing the whole or a part under guise of an abridgment, not fairly constituting a new work.

¹ *Leader v. Purday*, 7 C. B. 4.

² *Sweet v. Benning*, 16 C. B. 459; *Saunders v. Smith*, 3 Mylne & C. 711.

³ See *Gray v. Russell*, 1 Story (Circuit Court U.S.), 11, 18.

⁴ Selling a picture is not publication. *Turner v. Robinson*, 10 Ir. Ch. R. 121, 510. Nor is exhibiting a picture where copying is not allowed, nor exhibiting it to obtain subscribers for an engraving of it. *Id.*

⁵ *Chappell v. Boosey*, 21 Ch. D. 232.

⁶ *Boucicault v. Chatterton*, 5 Ch. Div. 267. Contra in America. *Palmer v. Dewitt*, 47 New York, 532.

With regard to each of these forms of infringement, it is to be observed that the question of intention does not enter into the question of piracy¹. The question is one of property, analogous to cases of trespass or conversion; the exclusive privilege which the law secures to authors may be equally violated whether the work complained of has been published with or without the *animus furandi*. The fact that a party has honestly mistaken the extent of his right to avail himself of the works of others will not excuse him from liability.

Piracies of the nature of those mentioned under the first head are seldom committed, and may be dismissed with the observation that it matters not that much original and valuable matter, far exceeding in all respects that appropriated, may be incorporated with the reprint of the copyrighted matter. The act is still an infringement, though the public might derive great benefit from the superior value of the work.

Piracies of the second kind are more difficult to deal with. The quantity of matter cannot be a true criterion of the commission of an infringement², since only a small **Quantity taken.** portion of a work may be pirated, and this the most important part of the work, or a very important part of it. For example: The defendant makes use, in a published volume of judicial decisions, of the head-notes, or marginal notes, of the plaintiff in a series of volumes of reports, of which the plaintiff owns the copyright. This is an infringement of the plaintiff's rights, for which the defendant is liable; though such notes constitute but a small part of the plaintiff's work³. Again: The defendant publishes a book entitled, 'Napoleon III. from the popular caricatures of the last thirty years.' Amongst many other pictures, the book contains nine caricatures from *Punch*, a publication owned by the plaintiff. Not more than one picture is taken from a single number of *Punch*, and the nine taken are from numbers extending over a period of several years. This is a breach of duty to the plaintiff⁴.

¹ *Clement v. Maddick*, 1 Giff. 98.

² *Bramwell v. Halcomb*, 3 Mylne & C. 737; *Bradbury v. Hotten*, L. R. 8 Ex. 1.

³ See *Saunders v. Smith*, 3 Mylne & C. 711; *Sweet v. Sweet*, 1 Jur. 212; *Sweet v. Benning*, 16 C. B. 459; *Wheaton v. Peters*, 8 Peters, 591 (Supreme Court U. S.).

⁴ *Bradbury v. Hotten*, L. R. 8 Ex. 1.

It may be doubtful if any part of the work of another may be taken *animo furandi*¹. How much may be honestly taken, that is, taken without any purpose of supplanting the copyright work, is the difficult question. It is clear that, if so much be taken as sensibly to diminish the value of the original, an infringement has been committed². It is not only quantity, but value also, that must be taken into the consideration³.

In deciding questions of this sort, it has been observed by an American judge that the nature and objects of the selections made must be taken into account, the quantity and value of the materials used, and the extent to which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work⁴. Many mixed considerations enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused into another work, so as to be indistinguishable in the mass of the latter; but yet the latter, having a distinct purpose from the copyrighted book, may not be an infringement. In other cases, the same materials may be used as a distinct feature of excellence, and constitute the chief value of the new work, and then the latter will be an infringement⁵. Be the quantity, then, large or small, if the part extracted furnish a substitute for the work from which it is taken, so as to work an appreciable injury, there is a violation of copyright.

A person is entitled to make a reasonable amount of quotation from a copyrighted production by way of review or criticism; but, under the pretence of review, no one has the right to publish a material part of the author's work⁶; that is, such a part as might have a sensible effect in superseding the original⁷,—not perhaps as a whole, but *quoad hoc*⁸.

¹ Mr Godson thinks it cannot. Patents and Copyrights, 216. Mr Curtis, *contra*. Copyrights, 251, note.

² *Branwell v. Halcomb*, 3 Mylne & C. 737; *Saunders v. Smith*, *id.* 711.

³ *Id.*

⁴ Mr Justice Story, in *Folsom v. Marsh*, 2 Story (Circuit Court U.S.), 100.

⁵ *Folsom v. Marsh*, 2 Story, 100. See *Bradbury v. Hotten*, L. R. 8 Ex. 1; *D'Almaine v. Boosey*, 1 Y. & C. 288, where the taking of the airs of a copyrighted opera, and putting them into the form of quadrilles and waltzes, was held piracy.

⁶ See *Wilkins v. Aikin*, 17 Ves. 422, 424.

⁷ *Roworth v. Wilkes*, 1 Campb. 94.

⁸ Curtis, 246, note.

In regard to imitations of the whole or part of a copyrighted work, the difficulty of determining the question of piracy is scarcely less; a question arising generally in cases
Likeness. where common and general sources of information have been drawn upon, and made into a proper subject of copyright. There may be likeness without copying; and, though the copyrighted work may have suggested the new one, the imitation may not be close enough to amount to infringement. The question, however, is whether the variation be substantial or merely colourable¹. For example: The defendant is alleged to have infringed the plaintiff's copyright in an Arithmetic by imitating its plan and contents. The test of the defendant's liability is whether he has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own work, with colourable alterations and variations, only to disguise the use thereof, or whether the defendant's work is the result of his own labour, skill, and use of common materials and common sources of knowledge, open to all men, the resemblances being accidental, or arising from the nature of the work;—whether, in short, the defendant's work be quoad hoc a servile or evasive imitation of the plaintiff's work, or a bona fide original composition from other common or original sources².

In cases of this kind, it is considered not enough to establish a violation of duty that some parts or pages of the later work bear resemblances in methods, details, and illustrations to the copyrighted work. It must further appear that the resemblances in those parts or pages are so close, so full, so uniform, and so striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or is mainly borrowed from it³.

The next case is that of abridgments; the rule of law in regard to which is said to be, that a fair abridgment, when the
Abridgments and digests. understanding is employed in retrenching unnecessary circumstances, is not a piracy of the original work. Such an abridgment is allowable as constituting a new work⁴.

Digests of larger works fall under the head of abridgments.

¹ Trusler v. Murray, 1 East, 363, note; Emerson v. Davies, 3 Story, 768, 793.

² Emerson v. Davies, supra.

³ Id.

⁴ Copinger, Copyrights, 101.

Such publications are in their nature original. The compiler intends to make a new use of them not intended by the original author. But such works must be real digests, and not mere colourable reproductions of the original, in whole or in an essential part. The work bestowed upon a digest must be something more than the labour of the pen and the arrangement of extracts; it must be mental labour, designed to produce a new work, the object of which must clearly appear to be consistent with the rights of the author of the original work¹.

¹ See the remarks of Lord Lyndhurst in *D'Almaine v. Boosey*, 1 Younge & C. 288, a case of infringement of a copyrighted musical composition.

CHAPTER XIII

VIOLATION OF RIGHTS OF SUPPORT

Statement of the duty. *A* owes to *B* the duty (1) not to remove, to *B*'s damage, the lateral support of *B*'s land, while it lies in its natural condition, or while, under title by grant or prescription, it lies in an artificial condition; (2) not to remove negligently, to *B*'s damage, the lateral support of *B*'s land with the superincumbent weight of buildings or materials thereon, adjacent to the boundary; (3) not to withdraw, to *B*'s damage, the subjacent support of his premises.

§ 1. LATERAL SUPPORT: WHAT MUST BE PROVED, ETC.

The owner of land has a right, against his neighbour, to what is termed the lateral support of the land. This right of lateral support is a right of support of the land in its natural condition, or, in case of grant or prescription, in an artificial condition; and this right of support of land in its natural condition is, *prima facie*, a right analogous to the right to make use of a running stream or of the air. It is not in the nature of an easement, and does not depend upon prescription or grant¹. But of course a right to remove the support may be acquired by grant², though not by custom or

¹ *Bonomi v. Backhouse*, El., B. & E. 622, 646; s. c. 9 H. L. Cas. 503. See *Darley Colliery Co. v. Mitchell*, 11 App. Cas. 127; *Bonaparte v. Wiseman*, 89 Maryland, 12, 23.

² *Rowbotham v. Wilson*, 8 H. L. Cas. 348, and Maryland case as just cited.

prescription, because that, it is said, would be oppressive and unreasonable¹.

This right of support of the land surrounding a man's premises, unlike rights of property in general, is not infringed, **Damage** for the purposes of a suit for tort, unless removing **necessary.** the soil cause damage²; but damage being caused by the removal of support, a right of action arises. Accordingly, to prove the removal of the lateral support of the plaintiff's land in its natural condition, to the plaintiff's damage, will make a *prima facie* case³. For example: The defendant, owner of premises adjoining the premises of the plaintiff which are located upon the sides of a declivity, excavates the earth of his land so closely to the boundary between his own and the plaintiff's property as to cause the soil of the plaintiff's premises, of its own natural weight, to slide away into the pit. This is a breach of duty to the plaintiff, for which the defendant is liable in damages⁴.

The doctrine however goes no further than to sustain a right of action for the sinking of land in its natural condition. The **Land in** action cannot be maintained if the sinking be due **natural** to a superincumbent weight placed upon the **condition.** plaintiff's premises, unless indeed some distinct right has been acquired against the adjoining occupant. For example: The defendant digs a gravel-pit in his premises close to the line between his own and the plaintiff's land. Within two feet of the line, on the plaintiff's land, stands a brick house, erected ten years before, and occupied by the plaintiff. By reason of the defendant's excavation, the premises being located on the side of a hill, it becomes necessary for the plaintiff to vacate his house, and to take it down, to prevent it from sliding into the defendant's pit. The defendant is not liable, since the plaintiff had acquired no legal right to the support of his house⁵.

¹ *Hilton v. Granville*, 5 Q. B. 701; *Wakefield v. Buccleuch*, L. R. 4 Eq. 613.

² *Bonomi v. Backhouse*, *supra*.

³ *Thurston v. Hancock*, 12 Mass. 220. See *Gilmore v. Driscoll*, 122 Mass. 199; *Bonaparte v. Wiseman*, 89 Maryland, 12.

⁴ *Thurston v. Hancock*, *supra*.

⁵ *Thurston v. Hancock*, *supra*; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449; *Partridge v. Scott*, 3 M. & W. 220.

A right to lateral support of buildings is in the nature of a right of easement, and can be acquired either by grant or by prescription¹. But even though a building may have stood upon the plaintiff's premises for the period of prescription, if its walls were improperly constructed, so as for this cause to give way, and not by reason of the excavation alone, the plaintiff cannot recover². And the same would be true, if, within the period of prescription, a new story were added to the house, whereby the pressure was so increased as to cause the sinking³.

On the other hand, it is to be observed that the mere fact that there were buildings, recently erected, standing upon the border of the owner's land when it sank, will not prevent his recovering damages. If the soil sank, not on account of the additional weight, but on account of the operations in the adjoining close (though they were carefully conducted), and would have sunk had there been no buildings upon it, it is held that the person sustaining the damage is entitled to redress to the extent of his loss⁴. Clearly if the operation in the adjoining land was conducted with a negligent disregard to the rights of the plaintiff and the effect of such negligence was the fall of the plaintiff's building, the adjoining occupant is liable therefor⁵.

But in the absence of negligence in the defendant, if the damage to the plaintiff's premises would have been slight and inappreciable had there been no superincumbent weight, he will not be entitled to recover. For example: The defendant digs a well near the plaintiff's land, which causes the same to sink, and a building erected there within twenty years falls. If the

¹ *Dalton v. Angus*, 6 App. Cas. 740; *infra*, p. 268. In America the right cannot, it seems, be acquired by prescription. *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Tunstall v. Christian*, 80 Virginia, 1. Still it has been common in America to speak of the right as arising from grant or prescription. See *Gilmore v. Driscoll*, *supra*.

² *Dodd v. Holme*, 1 Ad. & E. 493.

³ See *Murchie v. Black*, 34 L. J. C. P. 337.

⁴ *Stroyan v. Knowles*, 6 H. & N. 454. But American courts hold that the value of the buildings could not be recovered, unless there was negligence; assuming that no right had been acquired by grant (or by prescription, if a right can so be acquired). *Gilmore v. Driscoll*, 122 Mass. 199, 206, 207.

⁵ See *Dodd v. Holme*, 1 Ad. & E. 493; *Bibley v. Carter*, 4 H. & N. 153; *Gilmore v. Driscoll*, *supra*.

building had not been on the plaintiff's land the land would still have sunk, but the damage to the plaintiff would have been inappreciable. This is no breach of duty¹.

The result therefore is, (1) that the defendant is liable for the damages suffered by his neighbour for the withdrawal of the lateral support when that act of itself, and without the fault of the neighbour, was the cause of the damage, including damage done to sound buildings built twenty years or more before; though the excavation was carefully made. (2) He is liable for all the damage suffered by withdrawing the support when he was guilty of negligence, including in the damages injuries to soundly built buildings however recently erected. (3) He is not liable, in the absence of grant or prescription, if the subsidence was caused by the weight of buildings, or by the defective condition of the same.

The right of lateral support to contiguous buildings may be acquired by grant or reservation, or by prescription². Where buildings have been erected in contiguity by the same owner, and therefore require mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support in favour of the original owner on a sale by him of any of the buildings. As against himself, on the other hand, there is a presumed grant of the right of support in favour of the purchaser, which right takes effect at once. And the reservation in the original owner, after one sale, of the right of support for the adjoining building, will enable a second purchaser, on buying this adjoining house, to claim against his neighbour the same right of support; since by the purchase he acquires all of his vendor's rights. It follows also that the same mutual dependency continues after subsequent alienations by the purchasers from the original owner, and this regardless of the question of time. For example: The defendant constructs a drain under his house to connect

Lateral support: how the right may be acquired: mutual support.

¹ *Smith v. Thackerah*, L. R. 1 C. P. 564.

² *Dalton v. Angus*, *supra*; *Lemaitre v. Davis*, 19 Ch. D. 281. Not by prescription, in *America*, *Tunstall v. Christian*, 80 Va. 1. See also *Gilmore v. Driscoll*, 122 Mass. 199, 207.

with a public sewer, and thereby weakens the support of the wall separating the defendant's house from the plaintiff's, to the injury of the latter's house. The two houses originally belonged to the same person, who had demised them both for ninety-nine years to *W*. The latter mortgages both to *B*, who assigns the mortgage to *H*, and *H* conveys (under a power) one of the houses to the plaintiff in July, and the other to the defendant in September following. The defendant's act in weakening the support of the plaintiff's house is a breach of duty, and the defendant is liable¹.

But the right to such support of buildings is not a natural right; and where the adjoining buildings were erected by different owners the right of support can be acquired in favour of either of the original owners (and their successors in estate) only by grant of the other or reservation, or by prescription. For example: The defendants pull down a house adjoining the plaintiff's without shoring up the latter, and thereby cause damage to the plaintiff's property. The houses were built about the same time, but by different owners of the soil; and there is no title to support either by grant or by prescription, nor has the pulling down been negligently done. The defendants are not liable; at least if the plaintiff has sufficient notice of the purpose of the defendants to enable him to take the proper precautions against the damage².

If there be an intervening house or store in the block, between the premises of the plaintiff and those of the defendant, the pulling down of the latter's building cannot be a breach of duty to the former in the absence of some special engagement between the parties, especially if the plaintiff's building was already in an unsafe condition³.

There appears to be no obligation resting upon the owner of a house towards his neighbour in the adjoining tenement to

Duty to keep in repair.	keep his house in repair (further than to prevent the same from becoming a nuisance ⁴) in a lasting and substantial manner. The only duty is deemed to be to
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¹ *Richards v. Rose*, 9 Ex. 218.

² *Peyton v. London*, 9 B. & C. 725.

³ *Solomon v. Vintners' Co.*, 4 H. & N. 585.

⁴ Compare *Giles v. Walker*, 24 Q. B. D. 656, as to care of premises on which thistles grow.

keep it in such a state that his neighbour may not be injured by its fall. The house may therefore be in a ruinous condition, provided it be shored up sufficiently, or the house may be demolished altogether, if this can be done without injury to the adjoining house¹.

If either of the cotenants of a party-wall² should wish to improve his premises before the wall has become ruinous, or
Cotenants of party-wall. incapable of further answering the purposes for which it was built, he may underpin the foundation, sink it deeper, and increase within the limits of his own land the thickness, length, or height of the wall, if he can do so without injury to the building upon the adjoining close. And to avoid such injury, he may shore up and support the original wall for a reasonable time, in order to excavate and place new underpinning beneath it; or he may pull the wall down for the purpose of building a new one³. To pull the wall down without intending to replace it would be evidence of an ouster, for which an action could be maintained⁴.

It is held in America that one of the cotenants cannot, without consent of the other, interfere with the wall unless he can do so without injury to the adjoining building. No degree of care or diligence in the performance of the work will relieve him from liability, if injury be done to the adjoining building by making the improvements. For example: The defendant, co-owner with the plaintiff of a party-wall between their premises, digs down his cellar about eighteen inches, underpinning the party-wall, and lowers the floor of his first story the same distance. In consequence of these operations, the division wall settles several inches, carrying down the plaintiff's floors, and cracking the front and rear walls of his (the plaintiff's) building. The defendant is liable to the plaintiff for the

¹ *Chauntler v. Robinson*, 4 Ex. 163, 170. By the Roman law no liability was incurred by the owner of a house which fell because of its ruinous condition. Dig. 39, 2, 7, §§ 2, 8. But security might be required against the impending danger. Moyle, Inst. i. p. 396; Grueber, *Lex Aquilia*, pp. 89, 90.

² For the different kinds of party-wall, see *Watson v. Gray*, 14 Ch. D. 192; *Weston v. Arnold*, L. R. 8 Ch. 1084. Compare the French law. Bigelow's *L. C. Torts*, 555, 556.

³ *Standard Bank v. Stokes*, 9 Ch. D. 68.

⁴ *Jones v. Read*, 10 Ir. C. L. 315, Ex. Ch.

damage thus caused, though the said operation were carried on prudently and carefully¹.

It follows that, if a party-wall rest upon an arch, the legs of which stand within the land of the respective owners, neither can remove one of the legs to the detriment of his neighbour, without his consent². On the other hand, either may run up the wall to any height, provided no damage be thereby done to the other³.

The existence of a right to fix a beam or timber into the wall of a neighbour's house depends upon the situation of the wall. If it stand wholly upon the land of the owner, it is clear that no such right can exist except by grant or possibly by prescription. Any attempt by the adjoining owner to fix a timber in the wall, without consent given, would be a trespass, for which an action would lie; or (probably) it could be treated as a nuisance and abated accordingly. And a wall thus situated (the adjoining owner having acquired no right to the enjoyment of it) may be altered or removed at pleasure, provided no damage be thereby done to the adjoining premises.

If however the wall be a party-wall owned in severalty to the centre thereof, or in common, by the adjoining owners, the case will of course be different; and each will be entitled to fix timbers into it, in a prudent manner, doing no damage to the other owner⁴.

Where the wall is owned in severalty to the centre, it is clear that neither owner can extend his timbers beyond the centre of the wall. To pass the line of division without permission would be as much a trespass as to make an entry upon the soil without permission.

On the other hand, the case would clearly be different if the wall were owned in common by the adjoining proprietors, since, as has elsewhere been observed⁵, each of the tenants in common is seised of the whole common property. And it follows that

¹ *Eno v. Del Vecchio*, 6 Duer (New York), 17, 27; s. c. 4 Duer, 58.

² *Partridge v. Gilbert*, 15 N. Y. 601; *Dowling v. Hennings*, 20 Maryland, 179.

³ *Matts v. Hawkins*, 5 Taunt. 20; *Brooks v. Curtis*, 50 N. Y. 639, 644.

⁴ See *Bigelow's L. C. Torts*, 555.

⁵ *Ante*, p. 213.

such a wall may also be taken down by either owner, for the purpose of rebuilding, if necessary¹.

§ 2. SUBJACENT SUPPORT: WHAT MUST BE PROVED, ETC.

While ordinarily a man's title to land includes the underlying soil to an indefinite extent towards the centre of the earth, it is settled law that there may be two freeholds in the same body of earth measured superficially and perpendicularly down towards the earth's centre; to wit, a freehold in the surface soil and enough lying beneath to support it, and a freehold in underlying strata, with a right of access to the same, to work therein and remove the contents².

This right in regard to the use of the subjacent strata however, as is above intimated, is not unqualified; on the contrary, it must be exercised, as in removing lateral support, in such a way as not to damage the owner of the surface freehold. What then the plaintiff has to prove in a case of the kind is that, to his damage, his freehold, in its natural condition, has been deprived by the defendant of its necessary support by underground excavation; that being the case, the defendant is liable, however carefully he may have conducted the work in his own freehold. For example: The defendants, a coal-mining company, lessees of a third person of coal-mines underlying the plaintiff's close, upon which there are no buildings, in the careful and usual manner of working the mine so weaken the subjacent support to the plaintiff's close, without his consent, as to cause the same to sink and suffer injury. The defendants are liable for the damage sustained³.

It is laid down that there is a difference between rights of support against a subjacent owner of land and an adjacent owner in regard to buildings upon the dominant tenement. The right to the support of buildings,

¹ *Stedman v. Smith*, 8 El. & B. 1.

² *Humphries v. Brogden*, 12 Q. B. 739; *Wilkinson v. Proud*, 11 M. & W. 33.

³ *Humphries v. Brogden*, *supra*. See *Popplewell v. Hodgkinson*, L. R. 4 Ex. 248; *Jordeson v. Sutton Gas Co.*, 1899, 2 Ch. 217, C. A.

as has already been observed, depends upon grant, reservation, or prescription. But against a person owning an underlying freehold, the owner of the surface freehold is entitled, without grant or reservation, to the support of all buildings erected, however recently, before the title of the lower owner began and possession was taken. For example: The defendants are lessees and workers of a mine under the plaintiff's freehold. The plaintiff, at various times before the defendants began their works, and within twenty years thereof, erects buildings above the mines on ground honeycombed by the workings of another company some years before. The workings by the defendants increase the defective nature of the ground, and a subsidence of the surface follows; and from this cause and the fact that the plaintiff's buildings were not constructed with sufficient solidity, considering the state of the ground, damage results to the plaintiff's buildings. The defendants have violated their duty to the plaintiff by not shoring up and supporting the overlying tenement¹.

The support required, in the absence of grant or prescription, appears however to be merely a reasonable support. Whether the owner of the upper tenement could require the owner or occupant of the lower to support structures of extraordinary weight is doubtful. The true view seems to be that when the owner of the whole property severs it by a conveyance either of the surface, reserving the mines, or of the mines, reserving the surface, he intends, unless the contrary be made to appear by plain words, that the land shall be supported not merely in its original condition, but in a condition suitable to any of the ordinary uses necessary or incidental to its reasonable enjoyment².

There is an analogous right of support in respect to the upper stories of houses divided into horizontal tenements. It

¹ *Richards v. Jenkins*, 18 Law T. n. s. 437. Of course, if the buildings would have fallen without the act of the defendants, they would not be liable for the damage to them.

² *Richards v. Jenkins*, *supra*. In this case however Mr Baron Channel inclined to think that, if the buildings were erected *after* the defendants took possession, the period of prescription should elapse before a right to their support could be acquired.

is laid down that if a building is divided into floors or 'flats,' separately owned, the owner of each upper floor or 'flat' is entitled to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself¹. The same would (probably) be true if the stories of the building were *leased* to different persons.

Upper stories
of houses :
vertical sup-
port.

¹ Dalton v. Angus, 6 App. Cas. 740, 793; Caledonian Ry. Co. v. Sprot, 2 Macq. 449.

CHAPTER XIV

VIOLATION OF WATER RIGHTS

Statement of the duty. *A*, a riparian proprietor or mill-owner, owes to *B*, a riparian proprietor below, on the same stream, the duty not to take, except for domestic purposes, or for the needs of a mill suited to the size of the stream, anything more than a usufruct of the water thereof.

§ 1. USUFRUCT AND REASONABLE USE OF STREAMS: WHAT MUST BE PROVED, ETC.

Riparian proprietors have rights in the water of the streams flowing by or through their lands, which may be thus stated:

Nature of the right: usufruct: reasonable use. Each proprietor is entitled to the enjoyment of the water *ex jure naturæ*, as a natural incident to the ownership of the land¹. And the right is like ordinary property rights in this, that an action may be maintained for an infraction though no actual damage has been sustained². Examples from the authorities just cited will presently appear.

There have been some expressions by the courts, and one or two American decisions, to the effect that the right to the use of a running stream is absolute, like the right to the enjoyment of land; so that any diminution of the water by an upper proprietor is deemed actionable if he has not a right by grant,

¹ *Embrey v. Owen*, 6 Ex. 353, 369, Parke, B.

² *Id.*; *Sampson v. Hoddinott*, 1 C. B. N. S. 590.

or by prescription, just as an entry upon land without license is actionable¹. And this view has been urged in England².

The true principle however is that each riparian owner has at least a right of usufruct ('usus-fructus')³ in the stream, subject to the rights, whatever they may be, of the riparian owners higher up, but that no one can have an absolute right, for any and every purpose, to the whole volume of water. That is, there can be no infraction of the right by any abstraction of water which does not sensibly affect its volume. Without such an act, the usufruct is not interfered with, and the right of other proprietors has not been infringed⁴. It is only for an unreasonable use that an action will lie⁵. To make then a *prima facie* case, the lower proprietor has to prove that the upper proprietor has taken an amount of water from the stream such as has sensibly diminished the current; presumptively that would be unreasonable, unless the plaintiff made his claim as upon a mill-stream.

What amounts to an unreasonable use of a stream will vary according to the circumstances of the case. To take a quantity of water from a large stream for agriculture or for manufacturing purposes might cause no sensible diminution of the volume; while taking the same quantity from a small brook passing through many farms would be of great and manifest injury to those below who need it for domestic or other use. This would be an unreasonable use of the water, and an action would lie therefor⁶.

The same would be true if a mode of enjoyment quite different from the ordinary one should be adopted, sensibly diminishing the volume of water for any considerable time⁷.

¹ *Wheatley v. Chrisman*, 24 Penn. St. 298. See *Crooker v. Bragg*, 10 Wendell (New York), 260.

² See the arguments in *Embrey v. Owen*, 6 Ex. 353.

³ For the general doctrine of usufruct in the Roman law, see Roby, *De Usu Fructus*.

⁴ *Embrey v. Owen*, *supra*; *Mason v. Hill*, 2 Nev. & M. 747; s. c. 5 B. & Ad. 1; *Miner v. Gilmour*, 12 Moore, P. C. 131; *Sampson v. Hoddinott*, 1 C. B. n. s. 590.

⁵ *Embrey v. Owen*, *supra*.

⁶ *Miner v. Gilmour*, 12 Moore, P. C. 131; *Elliot v. Fitchburg R. Co.*, 10 Cushing (Mass.), 191.

⁷ *Sampson v. Hoddinott*, 1 C. B. n. s. 590.

For example: The defendant, an upper riparian owner, diverts much water from the stream into a reservoir, and delays it there to supply a factory; this being an extraordinary use of the stream. The act is a breach of duty to the plaintiff, a lower owner¹. Again: The defendant owns a great tract of porous land adjacent to a stream, the water of which he diverts by canals, in order to irrigate his land, sensibly diminishing the stream. This is a breach of duty to the plaintiff, an owner lower down².

These examples illustrate the rule that the action does not require proof of special damage³. A stream may be much reduced in size without causing any actual loss to lower proprietors; but the *right* being to a full volume of water, the diminution of the stream in any sensible, material degree by the upper proprietor is an infraction of that right, and accordingly creates liability. If, on the other hand, there is no diminution of the stream when it reaches the plaintiff, there is no liability whatever the abstraction. For example: The defendants erect a dam across a stream and take a considerable part of the water; but the amount so taken is made good by other water which the defendants let into the stream, and the plaintiff in fact sustains no damage. There is no infraction of the plaintiff's right⁴.

Again, every riparian proprietor may use the water of the stream for his natural domestic purposes, including the needs of his animals, and this without regard to the effect it may have, in case of deficiency, upon those lower down⁵. That is, the right is not limited to the usufruct; the whole may be taken if needed,—it would be deemed a reasonable user.

And this leads to the remark that one criterion of liability for abstracting water from streams, used for milling purposes,

¹ Wood *v.* Waud, 3 Ex. 748, 781.

² Embrey *v.* Owen, 6 Ex. 353, 372.

³ See Harvard Law Rev., Dec. 1899, p. 299.

⁴ Elliot *v.* Fitchburg R. Co., 10 Cushing (Mass.), 191. See also Seeley *v.* Brush, 35 Conn. 419; Chatfield *v.* Wilson, 31 Vermont, 358; Gerrish *v.* New Market Manuf. Co., 30 New Hampshire, 478, 483.

⁵ Miner *v.* Gilmour, 12 Moore, P. C. 131; Wood *v.* Waud, *supra*.

(probably) is whether, considering all the circumstances, the size of the stream and that of the mill-works, **Mill-streams.** there has been a greater use of the stream, in abstracting or detaining the water, than is reasonably necessary and usual in similar establishments for carrying on the mill. A mill-owner is not liable for obstructing and using the water for his mill, if it appear that his dam is of such magnitude only as is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein, and that his mode of using the water is not unusual or unreasonable, according to the general custom of the country in dams upon similar streams; and this, whatever may be the effect upon the owners of land below¹.

The water of a stream running wholly within a man's land may be diverted, if it be returned to its natural channel before reaching the lower proprietor²; and this could **Stream wholly within one's land.** perhaps be done where the water runs between the lands of riparian occupants, so far as the rights of parties lower down are concerned. The only person entitled to complain of such an act would be the opposite proprietor.

The foregoing remarks suppose that there exists no right by prescription or grant to the use of the stream by either the **Prescription or grant.** upper or lower proprietor. The rights and burdens of the parties may be greatly varied by grants or by prescription.

With regard to surface water running in no defined channel, the rule of law is that every occupant of land has the right to **Appropriating general surface water.** appropriate such water, though the result be to prevent the flow of the same into a neighbouring stream, or upon the land of an adjoining occupant³.

¹ *Springfield v. Harris*, 4 Allen (Mass.), 494. See *Davis v. Getchell*, 50 Maine, 602; *Merrifield v. Worcester*, 110 Mass. 216; *Hayes v. Waldron*, 44 New Hampshire, 580.

² *Miner v. Gilmour*, supra; *Tolle v. Correth*, 31 Texas, 362.

³ *Broadbent v. Ramsbotham*, 11 Ex. 602; *Luther v. Wiinisimmet Co.*, 9 Cushing (Mass.), 171; *Gannon v. Hargadon*, 10 Allen (Mass.), 106; *Curtis v. Ayrault*, 47 New York, 73, 78; *Livingston v. McDonald*, 21 Iowa, 160, 166.

Nor can there be any prescriptive right to such water. For example: The defendant, for agricultural and other useful purposes, digs a drain in his land, the effect of which is to prevent the ordinary rainfall, and the waters of a spring arising upon his land, and flowing in no defined channel, from reaching a brook, upon which the plaintiff has for fifty years had a mill. The defendant is not liable for the diversion, however serious the inconvenience to the plaintiff¹.

In the Pacific States of America the law is peculiar. There he who first duly appropriates all the waters of a stream running in the public lands becomes entitled to the same to the exclusion of all others². But if only part is appropriated, another may appropriate the rest; or if all is appropriated only on certain days, others may appropriate it on other days³.

§ 2. SUB-SURFACE WATER

In regard to underground streams, if their course is defined and known, as is the case with streams which sink under ground, pursue for a short distance a subterraneous course, and then emerge again, the owner of the land lower down has the same rights as he would have if the stream flowed entirely above ground⁴. But, if the underground water be merely percolation, there can be no breach of duty in cutting it off from a lower or adjoining landowner. And there can be no prescriptive right to the water. For example: The defendant, a landowner adjoining the plaintiff, digs on his own ground an extensive well for the purpose of supplying water to the inhabitants of a district, many of whom have no title as landowners to the use of the water. The plaintiff has previously for more than sixty years enjoyed the use of a stream (for milling purposes) which was chiefly supplied

¹ Broadbent v. Ramsbotham, *supra*; Rawstron v. Taylor, 11 Ex. 369.

² Smith v. O'Hara, 43 California, 371.

³ *Id.* As to what is a due appropriation, see Weaver v. Eureka Lake Co., 15 California, 271; McKinney v. Smith, 21 California, 374.

⁴ Dickinson v. Grand Junc. Canal Co., 7 Ex. 282.

by percolating underground water, produced by rainfall; which water now, after the digging of the well, is cut off and fails to reach the stream. The defendant's act is no breach of duty to the plaintiff¹.

¹ *Chasemore v. Richards*, 7 H. L. Cas. 349, overruling *Balston v. Bensted*, 1 Camp. 463. No right to such percolating water can arise by grant or by prescription apart from the right to the land itself. *Id.* Further see *Chase v. Silverstone*, 62 Maine, 175; *Wilson v. New Bedford*, 108 Mass. 261; *Frazier v. Brown*, 12 Ohio St. 294; *Hanson v. McCue*, 42 California, 303. In some American States the right to cut off percolating water depends, as by the Roman law, upon the reasonable use of the soil. *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439; *Katz v. Walkinshaw*, 70 Pacific Rep. 663. See *Harvard Law Rev.*, Feb. 1903, pp. 295, 296. As to polluting streams, see post, p. 285.

CHAPTER XV

NUISANCE

Statement of the duty. *A* owes to *B* the duty (1) not to obstruct or impair the use of the public ways or waters in such a manner as to cause damage to *B*; (2) not, except in the ordinary, natural use of his own, to flood the land of *B* with water collected upon his own land, or by changing the course of currents¹; (3) not to cause or suffer the existence upon his own premises of anything not naturally there which while there causes damage to *B*; (4) not to use his own premises so as to endanger the life or impair the health of *B*, or to disturb *B*'s comfort, to his damage, in the use of his (*A*'s) premises.

Public nuisances are indictable nuisances, being committed (1) in the public ways or waters, or (2) on private premises to the prejudice of the general public².

Private nuisances are non-indictable nuisances, being committed on private premises to the prejudice of one person, or but a few persons, of the neighbourhood.

A public nuisance may be also a private nuisance.

§ 1. WHAT CONSTITUTES A NUISANCE

It appears to be of the essence of a nuisance that there should be some duration of mischief; a wrong producing damage

¹ But see *infra*, p. 285.

² 'If a person erects on his own land anything whatever calculated to interfere with the convenient use of the road, he commits a nuisance.' Stephen, J., in *Brown v. Eastern Ry. Co.*, 23 Q. B. Div. 391, 392, case of a heap of dirt by the roadside. Negligence is not necessary. *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588, 600; *Hauck v. Tide Water Co.*, 153 Penn. St. 366.

instantaneously, as in the case of an explosion¹, could hardly be a nuisance. And then further to determine what constitutes a nuisance, so as to render the author of it liable to a neighbour in damages, a variety of other considerations must often be taken into account; especially where the act in question has been committed in a populous neighbourhood, in the prosecution of a manufacturing business. And even if the business itself be unlawful, it does not follow that a private individual can call for redress by way of a civil action for damages. Whether he can do so or not will depend upon the question whether he has sustained special damage, by reason of the thing alleged to be a nuisance.

Even supposing the nuisance not to be a public one, that is, not to affect seriously the rights of the public in general, much difficulty arises in determining when the business carried on upon neighbouring premises, either in itself or in the manner of conducting it, is so detrimental as to subject the proprietor or manager to liability in damages. And this difficulty was until recently increased by certain inexact terms used in the old authorities. It was said that if a business was carried on in a 'reasonable manner,' an action for damages could not be maintained, though annoyance resulted; and the term 'reasonable manner' was explained as meaning that the business was to be carried on merely in a *convenient* place. That is, a trade was not to be treated as a nuisance if carried on in the ordinary manner in a convenient locality. The result was to bestow upon a manufacturer the right to ruin his neighbour's property, provided only his business was carefully conducted in a locality convenient for its management².

Recent authorities have however changed all this, by declaring that, when no prescriptive right is proved, the true meaning of the term 'convenient,' used by the older authorities, lies in the consideration whether the plaintiff has suffered a visible detriment in his property by reason of the management or nature

¹ An explosion might be a *consequence* of a nuisance however. See *Kinney v. Gerdes*, 116 Alabama, 310; *Rudder v. Gerdes*, id. 332. These cases review the authorities as to *keeping* gunpowder in large quantities.

² *Comyns's Digest*, Action upon the Case for a Nuisance, C; *Hole v. Barlow*, 4 C. B. n. s. 334.

of the defendant's business; if he has, the defendant is liable. Convenience is a question for the neighbour and not for the manufacturer; and visible damage to the neighbour's property shows that the business is carried on in an inconvenient place¹.

The plaintiff accordingly makes a presumptive case against the defendant by showing that the defendant is carrying on a business in the neighbourhood of the plaintiff, which has actually and visibly done harm to the plaintiff's property there. For example: The defendants are proprietors of copper-smelting works in the plaintiff's neighbourhood, where many other manufacturing works are carried on. The vapours from the defendants' works, when in operation, are visibly injurious to the trees on the plaintiff's estate; the defendants having no prescriptive right to carry on their business as and where they do. The defendants are guilty of a breach of duty to the plaintiff, for which they are liable in damages; though, for the purposes of manufacturing, the business is carried on at a convenient place².

But a person living in a populous neighbourhood must suffer some annoyance; that is part of the price he pays for the **slight detri-** privileges which he may enjoy there. He cannot **ment.** bring an action for every slight detriment to his property which a business in the vicinity may produce. Or, to state the case in the language of judicial authority, if a man live in a town, he must submit to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man live in a street where there are numerous shops, and a shop be opened next door to him, which is carried on in a fair and reasonable way, he has no ground of complaint because to himself individually there may arise much discomfort from the trade carried on in the shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result

¹ *Bamford v. Turnley*, 3 Best & S. 62, 66; *Cavey v. Ledbitter*, 13 C. B. N. S. 470; *St Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

² *St Helen's Smelting Co. v. Tipping*, *supra*. See also *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; s. c. 7 H. L. Cas. 600.

of that occupation is a visible injury to property, the case is different¹.

It should be observed in this connection that the plaintiff is not precluded from recovering by reason of the fact that he had **Notice of** notice of the existence of the nuisance when he **works.** located himself near it. If the thing complained of be unlawful—if there be no prescriptive right to do it—the doer cannot set up notice to escape liability². For example: The defendant is a tallow-chandler, carrying on his business in a certain messuage, in such a manner as to convey and diffuse noxious vapours and smells over premises adjoining, which the plaintiff takes possession of while the defendant is carrying on his business. The defendant is liable³.

Subject to any annoyance which may result from the right which every landowner has to the ordinary and natural use of his premises, it is held by high authorities that no **Turning** one may turn water from his own land back upon **water back.** that of his neighbour without having acquired a right so to do by statute or by grant or prescription⁴; and this though the water thrown back comes of natural rainfall⁵. Such an act might by these authorities be treated as a trespass, and therefore should be redressible though no damage had been sustained; for otherwise a right to send the water there might eventually be acquired by prescription, to the substantial confiscation of the particular piece of land. For example: The defendant erects an embankment upon his land, whereby the surface water accumulating upon the plaintiff's land is prevented from flowing off in its natural courses, and caused to flow in a different direction over his land. This is a breach of duty for which the

¹ Lord Westbury in *St Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

² *Bliss v. Hall*, 4 Bing. N. C. 183; *Bamford v. Turnley*, 3 Best & S. 62, 70, 73.

³ *Bliss v. Hall*, *supra*.

⁴ *Hurdman v. Northeastern Ry. Co.*, 3 C. P. Div. 168; *Whalley v. Lancashire Ry. Co.*, 13 Q. B. Div. 131; *Tootle v. Clifton*, 22 Ohio St. 247. See also *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Giesemer*, *id.* 407; *Ogburn v. Connor*, 46 California, 346; *Laumer v. Francis*, 23 Missouri, 181.

⁵ *Hurdman v. Northeastern Ry. Co.*, *supra*.

defendant is liable to the plaintiff, though the latter suffer no damage thereby¹.

More clearly then will the flooding of a neighbour's land create liability when damage is caused; indeed, liability is in America held to be created not only where the water is thrown back by means of a dam, but also where a stream or a ditch is caused to overflow by turning into it water not naturally or entirely tributary to it. For example: The defendant, in the course of reclaiming and improving his land, collects the surface water of his premises into a ditch, and thereby greatly increases the quantity, or changes the manner, of the flow upon the lower lands of the plaintiff, to his damage. The defendant is liable².

So far as the doctrine of the two preceding paragraphs applies to surface water, or water flowing through drains or ditches, and not in natural streams, it is rejected by some American authorities. By these it is held that a coterminous proprietor may change the surface of his land by raising or filling it to a higher grade, by the construction of dykes, or other improvements, though the effect be to bring an accumulation of water on adjacent land, and to prevent it from passing off. The right to the free use of one's land above, upon, or beneath the surface cannot, it is deemed, be prevented by considerations of damage to others caused in that way, so long as the operations are carried on properly for the end in view³.

If the water of a stream be polluted, or otherwise rendered useless, or perhaps materially less useful than it was before, whether it be surface or sub-surface water, and damage ensue to another riparian owner, he can

¹ *Tootle v. Clifton*, 22 Ohio St. 247. This, it should be observed, is not the case of bringing water, as by means of a reservoir, upon one's land (*Rylands v. Fletcher*, L. R. 3 H. L. Cas. 330; post, chapter xvii.); for there the purpose is not to throw the water back but to hold it. Escape in such a case might not be a trespass.

² *Livingston v. McDonald*, 21 Iowa, 160. A purchaser would be liable for continuing the nuisance, at least after notice.

³ *Gannon v. Hargadon*, 10 Allen (Mass.), 106; *Dickinson v. Worcester*, 7 Allen (Mass.), 19; *Brown v. Collins*, 53 New Hampshire, 443.

maintain an action therefor, unless a right to do the thing has been acquired by statute or by grant or prescription¹. In the case of statutory authority to pollute the waters of a stream however this doctrine is to be taken with qualification. It has been laid down in regard to such cases that a city is not liable for polluting by sewage the water of a stream which it has a right to use for that purpose, so far as the effect is the necessary result of the system of drainage adopted by the city; but it is otherwise if the pollution is attributable to the negligence of the city in managing the system or in the construction of sewers², or in any other particular. The right, whether statutory or otherwise, must be exercised in a reasonable and proper way³.

For milling and other purposes, for which some large or special use of the water of a stream is required, statutory rights are often granted, under various restrictions, to
Mills. flood the lands lying along the mill-streams, or to foul the water; for the nature of which rights reference should be made to the statutes and the judicial interpretations of them.

With regard to actions for nuisances to personal enjoyment, it appears to be quite clear that for such smells or vapours proceeding from a neighbour's premises as are merely
Bodily comfort: smells and vapours. disagreeable, at least such smells or vapours as are the necessary effect of a business properly conducted there, no action is maintainable⁴. The noxious gases must produce some important sensible effect upon physical comfort. A person is indeed sometimes said to be entitled to an unpolluted and untainted stream of air for the necessary

¹ *Wheatley v. Chrisman*, 24 Penn. St. 298; *O'Riley v. McCheeney*, 3 Lansing (New York), 278; *Merrifield v. Worcester*, 110 Mass. 316. See *Clowes v. Staffordshire Waterworks Co.*, L. R. 8 Ch. 125; *Goldsmid v. Tunbridge Wells Com'rs*, L. R. 1 Eq. 161, affirmed, L. R. 1 Ch. 349.

² *Merrifield v. Worcester*, *supra*. See *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, to the same effect in regard to the escape of water.

³ *Baxendale v. McMurray*, L. R. 2 Ch. 790. The fact that certain works, improperly constructed, in the public highway are satisfactory to the municipal authorities will not prevent them from being a nuisance. *Osgood v. Lynn R. Co.*, 130 Mass. 492.

⁴ See *St Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

supply and reasonable use of himself and family; but by the terms 'untainted' and 'unpolluted' are meant, not necessarily air as fresh, free, and pure as existed before the business in question was begun, but air not rendered to an important degree less compatible, or certainly not incompatible, with the physical comfort of existence¹.

The criterion therefore of liability for a supposed (private²) nuisance, affecting the bodily comfort of the plaintiff, is whether the inconvenience should be considered as more than fanciful,—more than one to mere delicacy or fastidiousness,—as an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and simple modes of life³. On the other hand, it is not necessary that health should be impaired⁴. For example: The defendant erects upon his premises, adjoining the premises of the plaintiff, a kiln for the manufacture of bricks, and in the process of the manufacture the smoke and vapours and floating substances from the kiln are constantly directed to and within the plaintiff's house so as to affect materially the comfort of himself and family as persons of ordinary habits of life. This is a breach of duty to the plaintiff, though it appear that the health of his family has actually been better since the erection of the kiln than before⁵.

It matters not what it is that produces the discomfort: smoke alone may be sufficient; so of noxious vapour alone; so of offensive smells alone. Whatever produces a material discomfort to human life in the neighbourhood is a nuisance, for which damages are recoverable⁶. But the provisions of statute

¹ *Walter v. Selfe*, 4 De G. & S. 315.

² It is doubtful if the right of action for injury by a public nuisance would stand on different ground; but the court in *Walter v. Selfe* is careful to say that a private nuisance is there spoken of.

³ *Walter v. Selfe*, *supra*. See also *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588, 600; *Crump v. Lambert*, L. R. 3 Eq. 409; affirmed 17 L. T. N. S. 133; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392.

⁴ *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588, 600; *Walter v. Selfe*, *supra*. 'The test is whether the smell is so bad and continuous as to seriously interfere with comfort and enjoyment.' *Lindley*, L. J., in the first case.

⁵ *Walter v. Selfe*, *supra*.

⁶ *Crump v. Lambert*, *supra*.

in regard to such annoyances, arising from the carrying on of a lawful business, should always be examined¹.

Liability for disturbing one's peace of mind appears to be more restricted, and to be confined to acts which would produce a like effect upon all persons, such as acts of indecency. If the disturbance, while affecting the plaintiff's mind disagreeably and seriously, would not so affect the mind of others generally, there is, it is held in America, no ground of action. This is deemed to be the case of mere noise on Sunday or during religious worship. For example: The defendant disturbs the plaintiff during divine service in church, by making loud noises in singing, reading, and talking. This is no breach of duty to the plaintiff².

**Disturbing
peace of
mind.**

§ 2. PUBLIC NUISANCES: WHAT MUST BE PROVED, ETC.

Thus far of private nuisances. In regard to public nuisances, it is to be observed that such become private nuisances as well, by inflicting upon a particular individual any special or particular damage; proof of such damage is enough. For example: The defendant, without authority, moors a barge across a public navigable stream, and harmfully obstructs the navigation thereof to the plaintiff, who at the time is floating a barge down the stream. This is a breach of duty to the plaintiff, for which the defendant is liable in damages³.

If however the discomfort, having the like effect upon all persons, produces no particular, actual damage to any individual, no individual can maintain an action for damages by reason of it. In other words, it is necessary to the maintenance of an action for damages for a public nuisance (as well as in the case

¹ In regard to smoke, under statutory provisions, see 10 & 11 Vict. c. 34, § 108; *Cooper v. Woolley*, L. R. 2 Ex. 88; *Smith v. Midland Ry. Co.*, 37 L. T. n. s. 224.

² *Owen v. Henman*, 1 Watts & Sergeant (Pennsylvania), 548. See also *First Baptist Church v. Utica R. Co.*, 5 Barbour (New York), 79; *Sparhawk v. Union Ry. Co.*, 54 Penn. St. 401, cases of public nuisance.

³ *Rose v. Miles*, 4 Maule & S. 101. See also *Booth v. Ratté*, 15 App. Cas. 188.

of a private nuisance) that the plaintiff should have suffered actual, specific damage thereby¹, and, by some American authorities, damage distinct in kind².

It matters not that the special damage sustained by the plaintiff is common to a large number of individuals, or to the whole neighbourhood; enough if there is actual damage to his property, or injury to his health, or to his physical comfort (as explained in considering private nuisances). The injury inflicted upon private interests is not merged in the wrong done to the general public. For example: The defendants carry on a large business as auctioneers near a coffee-house kept by the plaintiff in a narrow street in London. From the rear of the defendants' building, which there adjoins the plaintiff's house, the defendants are constantly loading and unloading goods into and from vans, and stalling their horses. This intercepts the light of the coffee-house so as to require the plaintiff to burn gas most of the daytime, obstructs the entrance to the door, and renders the plaintiff's premises uncomfortable from stench. The nuisance is a public one, but the plaintiff suffers a special and particular damage from it for which the defendants are liable to him³. Again: The defendants carry on a manufacturing business in such a way as to make themselves liable for causing a public nuisance. The plaintiff's premises are filled with smoke, and his house shaken so as to be uncomfortable for occupation. This is a breach of duty to the plaintiff, for which he is entitled to damages, though every one else in the vicinity suffers in the same way⁴.

It is however a difficult matter to state what sort of detriment will amount to special damage within the law of public nuisances. It appears to be necessary in the case of obstructions of public ways or waters that a particular user had been begun by the plaintiff, and that such user was interrupted by the wrongful act of the defendant⁵. Before the complaining party

What will
amount to
special
damage.

¹ *Benjamin v. Storr*, L. R. 9 C. P. 400; *Fritz v. Hobson*, 14 Ch. D. 542; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Milhau v. Sharp*, 27 New York, 612.

² *Shaw v. Boston & Albany R. Co.*, 159 Mass. 597, 599. Sed qu.?

³ *Benjamin v. Storr*, *supra*.

⁴ *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95.

⁵ See *Rose v. Miles*, 4 Maule & S. 101.

has entered upon the actual enjoyment of the public easement, the wrongful act does not directly affect him, or at least does not affect him in a manner to enable a court to measure the loss inflicted upon him. If he desire to make use of the easement, he can complain to the prosecuting officer, and require him to enter public proceedings against the offender; or (so it seems), he may proceed to make his particular use of the easement, and if the obstruction be not removed before he reaches it, or in time for him to have the full enjoyment of passage, he may bring an action for the damage which he has sustained in the particular case by reason of the obstruction.

This latter proposition follows from the rule of law already noticed, that the plaintiff is not barred of a recovery in damages by reason of having notice of the existence of the nuisance when he put himself in the way of suffering damage from it¹. Such a case does not come within the principle that a consenting party cannot recover for damage sustained by reason of an act the consequences of which he has invited², since he has not consented to the act complained of, or invited its consequences. He may have reason to suppose that the obstruction will be removed before he reaches it; or, if not, he may well say that it is wrongful, and *must* be removed before he reaches it, on pain of damages for any loss which he may sustain by reason of its continuance.

If the obstruction of itself be insufficient to cause any actual damage, it is considered that no right of action can be derived by incurring expense in removing it. For example: The defendant obstructs a public footway, and the plaintiff, on coming to the obstruction, in passing along the way, causes the obstruction to be removed; and this is repeated several times. No other damage is proved. The defendant is not liable³.

It follows that the mere fact that the plaintiff has been turned aside by reason of the obstruction and caused to proceed, if at all, by a different route from that intended by him, is not special damage; he must have suffered some specific loss by reason of being thus defeated in his purpose. And this would

¹ Ante, p. 284.

² 'Volenti non fit injuria.'

³ Winterbottom v. Derby, L. R. 2 Ex. 316.

be true also of obstructions to the public waggon roads. For example: The defendant obstructs a public highway leading directly to the plaintiff's farm, and the plaintiff is thereby compelled to go to his land, if at all, with his team, by a longer and very circuitous road; but no specific loss is proved. The defendant is deemed not liable to the plaintiff¹.

The case has been considered to be different if the way were of peculiar use to the plaintiff, as by being his only means of reaching his land with teams. For example: The defendant, by raising the water of his dam, floods a highway and renders it impassable; this highway furnishes the only means of reaching a part, in use, of the plaintiff's farm. The defendant is deemed to be liable².

¹ *Houck v. Wachter*, 34 Maryland, 265. Contra, *Brown v. Watrous*, 47 Maine, 161.

² *Venard v. Cross*, 8 Kansas, 248. Sed qu., unless it appears that this actually causes pecuniary loss?

CHAPTER XVI

DAMAGE BY ANIMALS

Statement of the duty. *A* owes to *B* the duty (1) to prevent his animals from doing damage to *B*, if *A* has notice of their propensity to do damage, and (2) to prevent them from straying from his own upon *B*'s premises.

§ 1. WHAT MUST BE PROVED, ETC.

Whoever keeps an animal with notice that it has a propensity to do damage is liable to any person who, without fault of his own legally contributing¹ to the injury, suffers an injury from such animal; and this though the keeper be not guilty of negligence in regard to keeping it properly or securely. The gist of liability for the damage is the keeping of the animal after notice of the evil propensity; proof accordingly makes a presumptive case². For example: The defendant has a monkey, which he knows has a propensity to bite *people*³. The plaintiff, without fault of her own, is bitten by the animal. The defendant is liable, however careful he may have been in keeping the monkey⁴.

If the animal be *feræ naturæ*, it will (probably) be presumed that the defendant had notice of any vicious propensity whereby

¹ As to this term, see post, pp. 368-371.

² *May v. Burdett*, 9 Q. B. 101. See *Jackson v. Smithson*, 15 M. & W. 563; *Card v. Case*, 5 C. B. 622; *Popplewell v. Pierce*, 10 Cushing (Mass.), 509; *Oakes v. Spaulding*, 40 Vermont, 347; *Clowdis v. Fresno Irrigation Co.*, 118 California, 315.

³ *Osborne v. Chocqurel*, 1896, 2 Q. B. 109.

⁴ *May v. Burdett*, supra.

the plaintiff had suffered injury, since it is according to the nature of such an animal to do damage¹. And even if the animal be domestic, the owner will be presumed to have notice of any propensity which is according to the nature of the animal. For example: The defendant's cattle stray into the plaintiff's garden, and beat and tear down the growing vegetables. The defendant is liable, though not guilty of negligence; since it is of the nature of straying cattle to do such damage².

In the case of injuries committed by domestic animals not according to the nature of such animals, it is clear that the owner is not liable if he had no notice that the particular animal had any evil propensity. For example: The defendant's horse kicks the plaintiff, neither the plaintiff nor the defendant being at fault, and the defendant having no notice of a propensity of the horse to kick. The defendant is not liable; since it is not of the nature of horses to kick people, when not provoked to the act³.

Statutes have been passed, declaring it unnecessary in an action against the owner of a dog to prove notice of a propensity of the animal to injure sheep or cattle. In the absence of statute however the rule requiring notice of the vicious propensity prevails in regard to dogs as well as with regard to other domestic animals⁴.

While however negligence in the owner of the animal is not necessary to constitute a breach of duty when the
Negligence. 'scienter' can be proved, negligence in the care of the animal will render the owner liable, though he did not know of the propensity.

When damage is done by animals upon the *owner's premises*,

¹ If a wild animal has been tamed and domesticated the case may be different. See arguments in *May v. Burdett*, supra.

² See *Cox v. Burbridge*, 13 C. B. n. s. 430, 438, Williams, J.

³ *Cox v. Burbridge*, supra. The plaintiff was a boy playing in the highway at the time of the injury, but there was no evidence that he had done anything to irritate the horse. Compare Digest 9, 1, 1, §§ 5, 6; and the following passage from Paul's Sent. i. 15, § 3,—'Ei, qui irritatu suo feram bestiam vel quamcumque aliam quadrupedem in se proritaverit, itaque damnum ceperit, neque in eius dominum, neque in custodem actio datur.' Huschke, Jur. Anteiustin., p. 429. This of course is contributory negligence, or culpa-compensation. See post, p. 368, notes 1 and 4.

⁴ See Bigelow's L. C. Torts, 490.

a different question, or set of questions, may arise. The case will ordinarily turn upon negligence, and negligence of a special kind, to wit, with reference to the occupancy of premises. The place where the damage was done may enter into the case; a bull may well be left at large in the owner's field, while a savage dog perhaps should not be¹. And then the character in which the person hurt entered the premises will have to be considered in determining the question of duty. Such person may have been 'invited' to enter; he may have been a trespasser; he may have been a bare licensee. The owner of premises obviously owes a duty to persons whom he induces to come there for his benefit, to wit, that they may do so safely so far as his own conduct is concerned; while towards others his duty may be very different. And in all these cases there may be a question of the effect of notice by the occupant, or knowledge by the person injured, of the state of things. For the principles touching such cases the reader must look to that part of the chapter on Negligence, relating to the Use of Premises².

§ 2. ESCAPE OF ANIMALS: WHAT MUST BE PROVED, ETC.

By the common law of England the owner of land is bound to keep his animals within his own grounds, fenced or not; if his animals escape and get into his neighbour's premises, he is liable for the very act as for trespass³, whether the escape was owing to his negligence or not⁴.

Duty to fence.

¹ *Loomis v. Terry*, 17 Wendell (New York), 496.

² Chapter xviii., § 10. Section 11, on assuming the risk, should also be noticed.

³ *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, 13; *Lee v. Riley*, 18 C. B. n. s. 722. As to dogs see *Read v. Edwards*, 17 C. B. n. s. 245. Further, see Pollock, Torts, 479-481, 6th ed.

⁴ *Webber v. Closson*, 35 Maine, 26. How strong the common law upon this subject is, is shown by cases applying the rule unhesitatingly to strays from open commons. See Year Book 20 Edw. 4, 11, pl. 10, where to an action of trespass with cattle the defendant pleaded that his land adjoined a place where he had common, and that his cattle *strayed from the common*, and that he drove them back as soon as he could. The plea was held bad, the court saying that if the land in which the defendant had common was not enclosed, he must still keep his beasts there and out of the land of others.

Proof of the animal's coming upon the plaintiff's premises is enough. The same is true indeed though the defendant's animals may not have escaped from his enclosure; if still an animal commit damage, by putting part of its body over, through, or beyond the boundary line, the defendant will be liable regardless of negligence. For example: The defendant's horse bites and kicks the plaintiff's horse through the partition fence between the plaintiff's and defendant's premises. The defendant is liable, though not guilty of negligence¹.

The escape of animals from the highway along which they are being driven or led is a different thing. This latter is not a trespass, that is, a breach of absolute duty; liability **Escape of ani-** on the contrary turns upon negligence on the part
mals from the of the owner or his servants². Trespassing or stray-
highway. ing animals, it may be added, should not be injured unnecessarily in driving them away³.

¹ *Ellis v. Loftus Iron Co.*, supra.

² *Goodwin v. Cheveley*, 4 H. & N. 631; *Tillett v. Ward*, 10 Q. B. D. 17, where an ox strayed into a shop.

³ Ante, p. 227.

CHAPTER XVII

ESCAPE OF DANGEROUS THINGS

Statement of the duty. *A* owes to *B* the duty to prevent the escape of any dangerous thing, to the damage of *B*, brought or made upon the premises of *A*; the escape being due to defects within the control, though it may be not within the knowledge, of *A*.

§ 1. NATURE OF THE PROTECTION REQUIRED: WHAT MUST BE PROVED, ETC.

The duty considered in the preceding chapter of restraining animals from doing damage has been treated as furnishing ground for an analogous duty with reference to inanimate things of a peculiarly dangerous character, which the occupant of premises has brought or made thereon,—the duty, to wit, so to keep such things that they shall not do mischief to the occupant's neighbour. Proof of the escape of the dangerous thing, to the damage of the plaintiff, makes a *prima facie* right of action.

But the rule is not to be taken without caution. It is laid down that where the owner of land, without negligence, or other misconduct, uses his land in the ordinary manner, he will not be liable in damages, though mischief should thereby be occasioned to his neighbour¹. Still a person who, for his own purposes, brings on

Analogy to
damage by
animals.

Use of land
in ordinary
manner:
mines and
reservoirs.

¹ Chasemore v. Richards, 7 H. L. Cas. 349. As to malice see *id.* 388, and ante, pp. 16-22.

his land, and collects and keeps there, anything likely to do mischief if it escapes, must, by the law of England, keep it there at his peril; and if he does not, he will be answerable, *prima facie*, for all the damage which is the natural consequence of its escape; and this however careful he may have been, and whatever precautions he may have taken to prevent the damage¹. For example: The defendants construct a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir, and under part of the intervening land, have been formerly worked; and the plaintiff has, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It has not been known to the defendants, or to any person employed by them in the construction of the reservoir, that such communication exists, or that there have been any old workings under the site of the reservoir; and the defendants have not been personally guilty of any negligence. The reservoir is in fact, but without the defendants' knowledge, constructed over five old shafts, filled with rubbish and other loose material, and leading down to the workings; and the reservoir having been filled with water, the water bursts down these shafts and flows by the underground channel into the plaintiff's mines, producing damage. The defendants are liable².

¹ *Rylands v. Fletcher*, L. R. 1 Ex. 265, Ex. Ch.; L. R. 3 H. L. 330. The decision of the Court of Exchequer (3 H. & C. 774) was reversed. See *National Telephone Co. v. Baker*, 1893, 2 Ch. 186.

² *Rylands v. Fletcher*, *supra*. See *National Telephone Co. v. Baker*, 1893, 2 Ch. 186. The general rule above stated has been the subject of great discussion on both sides of the Atlantic, since *Rylands v. Fletcher* was decided. It has been denied by some of the American courts, and adopted or favoured by others. It is denied by *Losee v. Buchanan*, 51 N. Y. 476, by *Cumberland Telephone v. United Electric Co.*, 42 Fed. Rep. 273, by *Brown v. Collins*, 53 New Hampshire, 442, and by *Marshall v. Melwood*, 38 New Jersey, 339; it is favoured by *Shipley v. Fifty Associates*, 106 Mass. 194, *Baltimore Breweries Co. v. Ranstead*, 28 Atl. Rep. 273 (Maryland), and other cases. See further *Bigelow's L. C. Torts*, 497-500. Some tendency to modify it has been shown in England, but that is as much as can be said. *Ponting v. Noakes*, 1894, 2 Q. B. 281, noxious trees on and wholly within one's land. In substance the rule stands. See *Pollock, Torts*, 473-476, 6th ed. 'The authority of *Rylands v. Fletcher* is unquestioned, but *Nichols v. Marsland* [L. R. 10 Ex. 255, 2 Ex. Div. 1] has practically empowered juries to mitigate the rule, whenever its operation seems too harsh.' *Id.* p. 476, 6th ed.

In such cases the owners of the upper tenement have however, as has already been intimated, a right to work their premises in the ordinary, reasonable, and proper manner, and are not liable for the effects of water which flows down into the lower tenement by mere force of gravitation. But where some unusual and extraordinary effort is put forth for effecting the occupant's purpose, the owner is liable for the injurious results which follow¹. For example: The defendant, owner of a coal-mine above the plaintiff's mine, works out the whole of his coal, leaving no barrier between his mine and the plaintiff's, the consequence of which is, that the water percolating through the upper mine flows into the lower one, and obstructs the plaintiff in getting out his coal. This is no breach of duty by the defendant; the water having flowed down in its natural course, and the defendant being entitled to remove all his coal². Again: The defendant, under the like circumstances, does not merely suffer the water to flow through his mine in its natural way, but, in order to work his mine beneficially, pumps up quantities of water which pass into the plaintiff's mine, in addition to that which would naturally have reached it, whereby the plaintiff suffers damage. This is a breach of duty to the plaintiff, though it is done without negligence and in the due working of the defendant's mine³.

If the damage be produced by vis major or by the act of God⁴, or otherwise, without the intervention of acts or omission of duty by the occupant or those for whom he is responsible, the case will be different. In the example given, if the damage had been caused by lightning bursting the reservoir⁵, and not by reason of the existence of the openings into the lower mines, the defendants would not have been liable. Again: The defendant's tenants,

Damage by
vis major or
act of God.

¹ Rylands v. Fletcher, *supra*; Fletcher v. Smith, 2 App. Cas. 781; Baird v. Williamson, 15 C. B. n. s. 376.

² Smith v. Kenrick, 7 C. B. 515, 564.

³ Baird v. Williamson, *supra*.

⁴ Nichols v. Marsland, L. R. 10 Ex. 255; s. c. 2 Ex. Div. 1, showing that this term includes events which human foresight could not *reasonably* anticipate. This case in both stages is very instructive.

⁵ Rylands v. Fletcher, L. R. 3 H. L. 330.

the plaintiffs, occupy the lower story of a warehouse, of which the defendant occupies the upper. A hole has been gnawed by rats through a box into which water from the gutters of the building is collected, to be thence discharged by a pipe into the drains. The water, now pouring through the hole, runs down and wets the plaintiffs' goods. The defendant is not liable¹. Again: The defendant owns premises on which stand yew-trees, which to his knowledge are poisonous. A third person clips some of the branches, which fall upon the plaintiff's land, and poison the latter's horses. The defendant is not liable².

Again if the bringing the dangerous thing upon the occupant's land, and all the works connected therewith, be effected under **Legislative authority.** sanction of legislative authority, the fact that they result in damage to the party's neighbour by purely natural escape or by authorized channels, and not by reason of negligence attributable to the occupant, will not render the occupant liable³. It is also certain, a fortiori, in such a case, that, if the escape be caused by the act of God, no liability follows. For example: The defendant is charged by law with the duty of maintaining water-tanks in his district for purposes of irrigation, as part of a national system of irrigation, for the welfare of the people. By reason of an extraordinary flood, and not by reason of the bad condition of the works, one of these tanks gives way, causing damage to the plaintiffs. The plaintiffs cannot recover therefor⁴.

On the other hand, if the works be of a nature to require legislative sanction, the proprietor or manager, when not having it, will be liable for damage produced by any escape or breaking thereof, however occurring. For example: The defendants make use of locomotive engines, without having obtained the necessary authority of law, and the plaintiff suffers damage by reason of fire proceeding from the same. The defendants are liable, though not guilty of any negligence in the management of the engines,

¹ *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Ross v. Fedden*, L. R. 7 Q. B. 661. See *Doupe v. Genin*, 45 New York, 119. But see *Marshall v. Cohen*, 44 Georgia, 489.

² *Wilson v. Newberry*, L. R. 7 Q. B. 31.

³ See *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679.

⁴ *Madras Ry. Co. v. The Zemindar*, L. R. 1 Ind. App. 364.

and though they would not have been liable had they had the proper authority¹.

§ 2. THE AMERICAN LAW

The American law on this important subject, which it may be worth while to consider, cannot be said as yet to have become settled. The authorities are conflicting; but the tendency in several of the States appears to be towards the English doctrine, so far at least as to make the keeper of *certain* things naturally dangerous a virtual insurer, *prima facie*, against harm from them².

It has been laid down accordingly in America, that one who knowingly keeps large quantities of nitroglycerine, dynamite, or gunpowder on one's premises must keep it from doing harm by explosion, though one complies with the law regulating such things and is not guilty of negligence³. So too it has been decided that the occupant of premises may be liable for damage caused by the fall of ice or snow from the roof of his building when the roof is so constructed as to make it substantially certain that, if the snow be not removed, accidents from snow-slides will occur; although the roof be constructed in the usual manner of the time⁴. And with regard to water collected in reservoirs, it is held that the embankments must be so thoroughly constructed that the water cannot percolate through them⁵.

The doctrine has also been laid down that where the alleged rights of adjoining landowners conflict, it is better that one of

¹ *Jones v. Festiniog Ry. Co.*, L. R. 3 Q. B. 733; *Vaughan v. Taff Vale Ry. Co.*, *supra*.

² *Bradford Glycerine Co. v. St Mary's Woollen Co.*, 45 L. R. A. 658 (Ohio); *Kinney v. Gerdes*, 116 Alabama, 310; *Rudder v. Gerdes*, *id.* 332; *Shipley v. Fifty Associates*, 106 Mass. 194; *Wilson v. New Bedford*, 108 Mass. 261. *Contra*, *Losee v. Buchanan*, 51 New York, 476. See *Harvard Law Rev.*, March, 1900, p. 600. The Alabama cases however put the wrong as one of nuisance.

³ *Bradford Glycerine Co. v. St Mary's Woollen Co.*, *supra*.

⁴ *Shipley v. Fifty Associates*, 106 Mass. 194; *Fitzpatrick v. Welch*, 174 Mass. 486. But in some States it is enough that ordinary care was exercised. *Underwood v. Waldron*, 33 Michigan, 232, 238; *Garland v. Towne*, 55 New Hampshire, 55.

⁵ *Wilson v. New Bedford*, 108 Mass. 261; *Pixley v. Clark*, 35 New York, 520.

American law
not settled:
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them should yield to the other and forego a particular use of his land, rather than, by insisting upon that use, deprive the other altogether of the use of his property; which might often be the consequence of carrying on the operation. This would of course be an obvious principle if stated with regard to a nuisance; but it is treated as applicable to other wrongs as well. For example: The defendants, in the course of digging a canal through their land, for which purpose they are clothed with legislative authority¹, find it necessary to blast rocks by the use of gunpowder. The result of the blasting is to throw fragments of rock against the plaintiff's house, whereby the plaintiff suffers damage. The defendants are deemed liable, though not guilty of negligence².

A distinction has however been declared to exist between an injury sustained in that way, and one sustained by the explosion of a boiler on the defendant's premises. For damage sustained in the latter way, it is deemed that no right of action arises unless the explosion was due to negligence of the manager³. The use of a boiler is not necessarily dangerous⁴.

¹ The work could not therefore be a nuisance when carefully conducted.

² *Hay v. Cohoes Co.*, 2 New York, 159.

³ *Losee v. Buchanan*, 51 New York, 476. In this case the rule in *Rylands v. Fletcher*, *supra*, is denied.

⁴ Further, see *Bigelow's L. C. Torts*, 496 et seq.

PART III

EVENTS CAUSED BY NEGLIGENCE

BREACH OF DUTY TO REFRAIN FROM
NEGLECT

CHAPTER XVIII

NEGLIGENCE

Statement of the duty. *A*, seeing or knowing, or being in a situation to see or know, that failing to exercise ordinary care, skill, or diligence towards *B*, in a particular place or situation, will be apt to do harm to *B*, owes to *B* the duty not to be guilty of such failure, to the damage of *B*.

The foregoing is a statement of duty, not for negligence universally, but for its more common or typical form, in which the relation of the parties is in no way modified by special facts, such as contract, office, or possession of land. It would be impracticable to go further without making the statement prolix.

Like fraud and malice, negligence is only an element of tort, not itself a tort; it is of a wrongful nature, but not alone a wrong.

Unlike fraud and malice, negligence is not represented by a number of torts having names of their own; its origin in the law is too modern for that.

The fundamental distinction between the wrongs of Part I. and Part II. on the one hand, and those of Negligence on the other, has been stated in treating of General Doctrine. The consequences complained of in the first two divisions are immediate, or begin immediately, upon the wrongful act or omission; the consequences complained of in negligence do not always follow at once upon the wrongful act or omission, and they are never intended¹.

¹ Ante, pp. 13, 14. Of course a man *might* intend the harmful consequences of his negligence; but the case would then belong to the category of intended

§ 1. WHAT MUST BE PROVED, ETC.

A man may sustain damage by reason of the negligence of another, and yet have no right of action for the same. Another element is necessary; namely, that the defendant owed a duty to the *plaintiff* not to be negligent¹. The rule is not peculiar to negligence², but it needs emphasis here. Negligence, breach of duty to the plaintiff, and damage, are then the essential elements of the right of action. In many cases the duty will be obvious on the general facts, and hence will not call for special consideration; in other cases it will not be obvious that there was a duty, or what the nature of the duty was. Such cases will call for examination of the question.

The result is, that it will be necessary to consider, first, the meaning of 'negligence,' as applicable to all cases in general, and, secondly, assuming negligence, whether the negligence (and damage) amounted to a breach of duty to the plaintiff. Damage, that is to say special damage, is a constant and unvarying factor throughout the chapter.

§ 2. LEGAL CONCEPTION OF NEGLIGENCE IN GENERAL

Negligence in the law is a technical term, and a complex conception. Conduct is considered negligent in law which might not be considered negligent in the popular acceptance of the term. Indeed the popular understanding is too apt to make its way, in unguarded or mistaken language, into the law books,—some special phase of the subject in its technical sense being spoken of perhaps as something other than negligence.

The significance of this will be seen when it is said that wrongs. And to make a case for that category, where the consequence was not, at least in part, immediate, it would be necessary to prove that the result was intended. Hence the immediateness or not of the result is material; all the difference, on the criminal side, between manslaughter and murder may be involved.

¹ *Membury v. Great Western Ry. Co.*, 14 App. Cas. 179, 190.

² *Ante*, p. 24.

negligence, in the eye of the law, embraces not merely want of care, its more familiar form, and thoughtlessness, but rashness and wantonness, in other words, danger known but disregarded or not heeded¹. And well enough; for what are rashness and wantonness but failure, in presence of danger, to respond to the prompting of judgment or conscience, which, in the one case (rashness), would not tolerate over-confidence, and, in the other (wantonness), would not excuse want of ordinary regard for another's rights²? Plainly that would be negligence. But rashness and wantonness stand upon a special footing in certain cases, sometimes creating liability, as will later appear, when negligence in the more common form would not³. That fact, no doubt, has caused judges and writers on law, now and then, too readily to consider rashness as not negligence at all⁴.

Legally speaking, then, negligence in common form, as a tort, imports misconduct causing unintended harm⁵, the misconduct consisting in a failure to respond to judgment or conscience according to ordinary standards of conduct.

Still, it should be distinctly observed that the law acts, or refuses to act, in accordance with the *manifestation* of conduct;

**Manifestation
of conduct the
test.**

in no case does it inquire into the defendant's attitude of mind to determine whether he was guilty of negligence. In this legal conception of it, as manifestation, negligence may consist in acts as well as in omissions, as follows from what has already been said.

Further, negligence may relate either to things seen or

¹ See *Claridge v. So. Staffordshire Tramway Co.*, 1892, 1 Q. B. 422, fast driving; *Maynard v. Boston R. Co.*, 115 Mass. 457. Rashness, recklessness, and wantonness are words applied indifferently, in many cases, to danger known but not heeded; but rashness properly is over-confidence, and recklessness or wantonness, disregard of another's rights. See for instance *Southern Ry. Co. v. Bush*, 122 Alabama, 470; *Louisville R. Co. v. Orr*, 121 Alabama, 489; *Louisville R. Co. v. Brown*, id. 221; *Abrahams v. Los Angeles Traction Co.*, 124 California, 411. All three approach, but still fall short of, intentional wrongdoing. They are however treated as evidence of malice and trespass as well as of negligence. See ante, pp. 21, 81, 168, 172. Rashness and recklessness are also evidence in deceit, on the allegation of fraud. See ante, p. 64.

² If the function itself is so dulled as not to speak, it is a case of mental derangement, more or less, and may not be negligence.

³ See post, pp. 344, 345.

⁴ See e.g. *Smith v. Baker*, 1891, A. C. 325, 347, Lord Bramwell.

⁵ Ante, p. 14.

known, or to things unseen or unknown. A man may fail in duty by ignorance, as he does when, as a man of 'Passive' and 'active' negligence. average prudence, care, or diligence, he ought to know the facts¹, in which case his negligence may be called 'passive' negligence. He may fail with knowledge; in which case his negligence may be called 'active' negligence. Important distinctions follow, as will appear later.

Negligence, in its common or typical form, may now be defined. It consists in failure, in the particular place or situation, to conform to the conduct of a prudent, careful, skilful, or diligent man, often called the 'average' man²; which failure, if it cause damage, is a breach of duty unless the relation of the parties is modified by special facts. The definition has regard of course to one's conduct towards others, and not to conduct in which others are not concerned; for conduct may be prudent, careful, skilful, diligent, and yet without reasonable regard for the rights of other men.

Liability ex delicto for the consequences of negligence as regarded by the law arises however by reason only of acts, or omissions after the doing of acts³. In respect of omissions not preceded at any time by overt acts, either by the defendant or by his predecessors in interest, in connection with that which occasions the damage, there may indeed be liability ex contractu (the omission being a breach of contract) or even ex delicto; there can be no liability in tort as for negligence. An innkeeper may be liable in tort for refusing to receive a man as guest into his inn; but the liability incurred cannot properly be treated as growing out of negligence.

¹ In such cases a man is sometimes said to have *notice* of the facts as distinguished from knowledge. The case however is elliptical. What is really true is that the person, having knowledge of certain facts which suggest inquiry, is deemed to have notice of what reasonable inquiry would lead to. See Kennedy v. Green, 3 M. & K. 699.

² Other terms are 'fair man,' 'man of average intelligence,' 'man of ordinary intelligence or care, skill, or prudence,' and the like, according to the particular case. So by the Roman law; the rule of *culpa levis* imported an average standard. Grueber, *Lex Aquilia*, p. 223.

³ So it seems by the Roman law. Dig. 7, 1, 13, § 2; *Lex Aquilia*, fr. 8 pr. Grueber, pp. 25, 26, 208-214.

There can arise indeed no civil liability for the negligent omission to do a thing required by law, though commanded by the Legislature, unless that neglect be connected with the existence of something already done. A town may be required to build a bridge across a stream, but no one can maintain an action for damages against the town for neglecting, however inexcusably, to build the bridge¹; though an action might be maintained for damage caused by the breaking of a bridge through failure to repair it, if the town was bound to keep it in proper condition. In the latter case, there is an omission preceded (at some time) by an overt act; to wit, the building of the bridge². When it is said that no action *ex delicto* can be maintained for a pure non-feasance, consisting in neglect of duty, the former sort of case is to be understood as intended.

It is declared by all the authorities that the standard by which to determine whether a person has been guilty of negligence (in common form) is the conduct of the defendant in the particular situation³; the amount of care, skill, diligence or the like, varying according to the particular case. The amount of care or the like required may thus vary to the greatest extent, while the standard itself—the care, skill or diligence of a careful, skilful, or diligent man in the particular situation—remains the same⁴.

¹ Compare *Lex Aquilia*, fr. 8 pr.; Grueber, pp. 25, 26, 208–214, to the same effect. ‘Thus I am by no means obliged to close my neighbour’s shutters, although I see the storm approaching which will break the windows, and although I may prevent the damage without the slightest inconvenience to myself.’ Grueber, p. 209.

² *Id.*

³ Thus the place where men are employed has its bearing on the question of liability, as where soldiers are drilling or men are lopping off branches of trees. Compare Grueber, *Lex Aquilia*, pp. 128–130.

⁴ So by the Roman law, as expressed by the term *culpa levis*. The standard was ‘an objective one. It is true the conduct of a *diligens pater familias* [which the rule of *culpa levis* imported] will vary, but it will vary only in accordance with the circumstances of the case: the amount of the skill, strength, foresight will always be determined by the nature of the business or work to be done, and in so far the standard is one and the same for everybody under the same circumstances.’ Grueber, *Lex Aquilia*, p. 224. A diligent *pater familias* was a person ‘possessed of the qualities (skill, knowledge, experience) required for his work, and who also makes the efforts necessary to attain his object, and takes...due care and foresight.’ *Id.* p. 223.

But, if not properly understood, this standard may itself be misleading. A blacksmith finds a watch by the roadside, and on opening it and seeing that it is full of dirt, attempts to clean it, when a watchmaker is near; but in doing so, though exercising, it may be, the greatest care, he injures it by reason of his lack of skill. Now in attempting to put the watch in order, and thus perhaps preventing its ruin, he has done nothing that a prudent man might not have done; and, taking the criterion in its broadest sense, the blacksmith could not be liable to the owner of the watch for the damage which he did to it; while the law would probably be just the contrary¹.

A prudent *blacksmith* however would not have undertaken to put the watch in order; he would have taken it to the watchmaker. The prudent man, ordinarily, with regard to *undertaking* an act, is the man who has acquired the skill to do the act which he undertakes; a man who has not acquired that special skill is imprudent in undertaking to do the act, however careful he may be, and however great his skill in other things².

The criterion then of the conduct of the defendant in the undertaking of an act is to be understood with the limits suggested. The question to be raised with regard to a man's conduct brought in question in such a case is, whether an ordinary or average man of his calling or business or skill would have undertaken to do the thing in question; supposing the party to have exercised due care in executing the work undertaken.

When an act has been undertaken by a person whose business or profession covers the doing of acts of the kind in question, the question to be decided is, whether that skill or care or diligence

¹ It is to be noticed that as a watchmaker is near, the act could not be considered one of necessity.

² See *Dean v. Keate*, 3 Campb. 4. So by the Roman law. Imperitia quoque culpae adnumeratur: veluti si medicus ideo servum tuum occiderit, quod eum male secuerit, aut perperam ei medicamentum dederit. Dig. 9, 2, 7, § 8; id. 9, 2, 8; id. 50, 17, 132. Proculus ait, si mediens servum imperite secuerit, vel ex locato vel ex lege Aquilia competere actionem. Lex Aquilia, fr. 7, § 8; Grueber, Lex Aquilia, p. 24. Mulionem quoque si per imperitiam impetum mularum retinere non potuerit, si cae alienum hominem obtriverint, volgo dicitur culpae nomine teneri. Lex Aquilia, fr. 8, § 1; Grueber, pp. 26, 27.

has been exercised which a man of the same business would have exercised in the same situation.

In regard to omissions (after overt acts) to perform acts not distinctly and certainly required by law, the question of the duty to perform them is to be decided by the general practice of prudent or careful or diligent men of the same occupation, when such a practice exists. When no such general practice exists, as perhaps in regard to the use of fire-arms or other dangerous weapons¹, the question is decided upon the reasonably supposable conduct, higher or lower, of the prudent man, according to the circumstances or the nature of the case².

In the more common cases, such as actions for damage to property or for bodily injuries caused by collisions, the falling of timbers or other materials, or of buildings, unguarded excavations or openings, obstructions in the highway, blasting, explosions, fires, and runaways, and endless other 'accidents' so-called,—in common cases such as these the question actually put to the jury or to the judge for decision is whether the defendant was in the exercise of due or reasonable care at the time of the misfortune. Other questions may be involved; but the question of the defendant's negligence is always fundamental, and usually takes the form stated.

¹ The rule in early times in regard to such cases seems to have been that the defendant had to exempt himself from liability for the damage done, if he could, by showing that the misfortune happened entirely without his will, or at least without his fault. See Year Book 21 Hen. 7, 28 (shooting at butts); *Weaver v. Ward*, Hob. 134; *Lambert v. Bussey*, T. Raym. 421. But the rule has changed in conformity with modern theories of civil liability, as shown ante, p. 174, and the test now is of negligence as in other cases. *Stanley v. Powell*, 1891, 1 Q. B. 86; *Nitroglycerine Case*, 15 Wall. 524; *Moebus v. Becker*, 46 New Jersey, 41; *Winans v. Randolph*, 169 Penn. St. 606; *McCleary v. Frantz*, 160 Penn. St. 535; *Scanlon v. Wedger*, 156 Mass. 462; *Glueck v. Scheld*, 125 California, 288. See also *Dixon v. Bell*, 5 Maule & S. 198. Greater care will be required in the use of such weapons than in that of things not dangerous; but the question still is of the conduct of the prudent man in using them, and that question is one of fact. *Moebus v. Becker* and *McCleary v. Frantz*, supra.

Note then the distinction between the firing off a gun, and such cases as explosions of nitroglycerine or the bursting of reservoirs of the chapter preceding. Ante, pp. 297-300.

² See *Mulligan v. New Britain*, 69 Connecticut, 96; *Uggla v. West End Ry. Co.*, 160 Mass. 351; *Ellis v. Lynn R. Co.*, id. 341.

A remark should be made upon the question whether the conclusion or inference to be drawn from the facts in the case of an action for negligence is a matter for the judge or the jury (in jury cases) to decide. The authorities do not give any categorical answer to the question, but this appears to be the effect of them: Where the facts are found, and it is manifest, beyond ground for question, that a prudent man would or would not act or omit to act as the defendant has done, the conclusion or inference is for the judge. This is true whether the question be one of negligence in the defendant or contributory negligence¹, negligence in the plaintiff². The same is also true where the law has prescribed, as in some cases it has³, the nature of the duty, and also where there exists a well-known practice in the community, of a proper character; in such cases the standard of duty is fixed in regard to the very conduct to be pursued,—given the facts, and the conclusion is for the court. In other and more numerous cases the conclusion or inference is to be drawn by the jury.

¹ The so-called American 'look and listen' rule in regard to crossing steam or electric railways is an example. *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379; *Cawley v. La Crosse Ry. Co.*, 101 Wisconsin, 145. The rule is not accepted everywhere. *Atlantic City R. Co. v. Goodin*, 45 L. R. A. 671 (New Jersey). See *Harvard Law Rev.*, Nov. 1899, p. 226; post, p. 372.

² 'We are of opinion,' said Mr Justice Brewer, in *Elliott v. Chicago Ry. Co.*, 150 U. S. 245, 246, 'that the deceased was guilty of contributory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, Milwaukee, & St Paul Railroad*, 114 U. S. 615; *Delaware, Lackawanna, etc. Railroad Co. v. Converse*, 139 U. S. 469; *Aerkfet v. Humphreys*, 145 U. S. 418.' But if reasonable men might differ, the question is for the jury. *Warner v. Baltimore R. Co.*, 168 U. S. 339.

³ Thus in some of the American States trustees in making investments of funds must invest them in first mortgages of real estate, or in government securities, unless the instrument (if any) creating the trust otherwise prescribes or permits. See *Hemphill's Estate*, 18 Penn. St. 303. Practice or advice of others, however competent, would not excuse any departure from the requirement, in the absence of extraordinary circumstances. The rule just stated in regard to the funds in which investment should be made is not universal. *New England Trust Co. v. Eaton*, 140 Mass. 532, 535; *Brown v. French*, 125 Mass. 410.

It should further be stated that a very large part of the litigation pertaining to suits for negligence turns upon the question whether the facts submitted to the court make a case which may be submitted to the jury, in jury trials, as furnishing evidence upon which negligence may properly be found. To consider such questions would require a detailed examination of the authorities beyond the purpose of this book.

Thus far of what may be called the ordinary doctrine of negligence, or negligence in its common form, where the relation of the defendant to the plaintiff is merely that of man to man, no contract between the parties existing to modify the general doctrine, or to direct it into any particular channel, and no special situation or office affecting it in law. Several classes of cases will now be considered in which the relation of the parties is more or less affected by contract or by law, the general standard of liability being more or less affected accordingly, or superseded altogether; these to be followed by cases in which the question is whether the defendant owed any duty to the plaintiff.

§ 3. INNKEEPER AND GUEST

With regard to the duties of innkeepers, it will be almost sufficient in the present connection to say that, though it has sometimes been considered that for loss or damage to the goods of guests liability depends upon the question of negligence in the host, or in his servants acting for him¹, it is now more generally considered that an innkeeper's liability for the failure to keep the goods of his guest safely, when once delivered into the former's custody, arises independently of the question of negligence. The host is now held liable for damage to or loss of the goods put in his custody, though he exercise the greatest diligence in the care of them,

¹ Dawson v. Chamney, 5 Q. B. 164; Merritt v. Claghorn, 23 Vt. 177; Metcalf v. Hess, 14 Ill. 129.

unless the loss occur by the guest's negligence, or by vis major, inevitable accident, or the act of God¹.

It follows, *à fortiori*, that the innkeeper is liable in case of loss sustained by reason of his own negligence, or that of his servants; but, inasmuch as the question of his liability does not turn upon the proof of negligence in the ordinary sense, the subject need not be here pursued.

It is proper however to mark the fact in this connection that a question of contributory negligence² may arise in considering cases of innkeeper and guest, as well as in other cases. If the negligence of the guest occasion the loss in such a way that it would not have happened if the guest had exercised the usual care that a prudent man might reasonably be expected to have taken under the circumstances, the innkeeper is not liable³.

§ 4. BAILOR AND BAILEE

So much of the subject of bailment as relates to breaches of duty by common carriers may be dismissed with a brief word.

Negligence. The liability of a common carrier is similar to that of an innkeeper, and does not turn upon the question of negligence, the subject of the present chapter. And there are other cases in which the bailor of an article for special use, as a 'job-master' of carriages, while not for all purposes an insurer, is still liable, by the common law, for loss happening without negligence in the ordinary sense⁴. These too fall without the present subject.

¹ *Armistead v. Wilde*, 17 Q. B. 261; *Cashill v. Wright*, 6 El. & B. 891; *Morgan v. Ravey*, 6 H. & N. 265; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515; *Shaw v. Berry*, 31 Maine, 478; *Norcross v. Norcross*, 53 Maine, 163; *Berkshire Woollen Co. v. Proctor*, 7 Cushing (Mass.), 417; *Wilkins v. Earle*, 44 New York, 172; *Houser v. Tully*, 62 Penn. St. 92. See 26 & 27 Vict. c. 41, as to restrictions of liability.

² *Post*, § 14.

³ *Cashill v. Wright*, 6 El. & B. 891; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515.

⁴ See e.g. *Hyman v. Nye*, 6 Q. B. D. 685. The liability of one whose business is to let carriages is here put upon the footing of coach proprietors and railway companies. 'He is an insurer against all defects which care and skill can guard against.' *Id.* *Lindley, J.* He is not an insurer against all defects absolutely. *Id.*

It was long considered a settled doctrine of the English law that the duty of bailees was to be distributed under three heads, **Degrees of negligence.** having reference respectively to the nature of the bailment; to wit, (1) the duty to observe very great care, (2) the duty to observe ordinary care, and (3) the duty to observe slight care only. Conversely therefore the bailee was deemed to be liable for loss sustained by the bailor, under the first head, if the bailee were guilty of slight negligence; under the second head, if he were guilty of 'ordinary negligence,' or rather of negligence of an intermediate grade; and, under the third head, if he were guilty of gross negligence¹.

The application of these three degrees of negligence was thus explained: If the bailment was gratuitous, by the bailor, that is, for the sole benefit of the bailee, the bailee was deemed to be liable for loss or damage to the subject of the bailment occasioned even by slight negligence on his part. If the bailment was for hire, that is, for the mutual benefit of the bailor and the bailee, he was deemed to be liable for the consequences of negligence of an intermediate grade only. If the bailment was without benefit to the bailee, as e.g., if the bailor had requested the bailee to take care of his, the former's, goods without reward, the bailee was deemed to be liable for the result of gross negligence only².

This doctrine arose from a misconception apparently of the Roman law, the doctrines of which were resorted to in order to **Roman law misunderstood.** assist in the solution of a question which arose in England in the eighteenth century³. But it remained in the English law unchallenged for so long a time that it has not been readily abandoned, and it may be still considered as retaining some faint vitality in England and in various parts of the United States.

The tendency of authority for a considerable time has been to break away from this division of negligence, and to accept **Tendency of authority.** substantially what seems to have been the true doctrine of the Roman law in regard to bailments,

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L. C. 188, 7th ed.

² *Id.*

³ *Coggs v. Bernard*, *supra*. Lord Holt took his Roman law mainly from the mediæval jurists, or glossarists. Wharton, *Negligence*, § 57 et seq.; Smith, *Negligence*, 11 et seq., 2nd ed.

as well as in relation to other subjects covered by the title Negligence. The effect is to make the criterion of liability to depend upon the consideration already adverted to, whether the party complained of conducted himself in the particular situation as a man of prudence or carefulness or skill, of the same business, would have conducted himself, or as prudent or careful or skilful men, of the same business, generally do conduct themselves in the like situation¹.

This criterion indeed will often if not generally be found to be the real test applied in those cases in which the old terms are used. For example: The defendant, a bailee of money to keep without reward, gives the following account of himself: He was a coffee-house keeper, and had placed the money in question in his cash-box in the tap-room, which had a bar in it, and was open on Sunday; and on a Sunday the cash-box was stolen. The defendant's liability turns upon the question whether he has taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; if not, he is deemed to be guilty of 'gross negligence' and liable for the loss². Again: The defendants receive a deposit of bonds from a stranger, *S*, to be kept without reward. Subsequently another

¹ As indicating the tendency to discard the old theory of the three degrees of negligence, see *Wilson v. Brett*, 11 M. & W. 113; *Hinton v. Dibdin*, 2 Q. B. 646; *Grill v. General Collier Co.*, L. R. 1 C. P. 600; *Beal v. South Devon Ry. Co.*, 3 H. & C. 337; *Giblin v. McMullen*, L. R. 2 P. C. 317, 328; *The New World*, 16 Howard (Supreme Court U. S.), 469; *Milwaukee Ry. Co. v. Arms*, 91 U. S. 489, 494; *Cass v. Boston & L. R. Co.*, 14 Allen (Mass.), 448; *Lane v. Boston & A. R. Co.*, 112 Mass. 455; *Briggs v. Taylor*, 28 Vermont, 180.

In the Roman law there were two branches (rather than degrees) of negligence, expressed respectively by the terms 'culpa levis' (or 'levissima') and 'culpa lata.' The former was the absence of the diligence of a good man of affairs ('diligentia boni patrisfamilias'), that is in matters requiring skill, knowledge, or experience (e.g. the sufficiency of the walls of a building); the latter the doing or omitting what any man in his senses would not do or omit ('non intellegere quod omnes intellegunt'). Dig. 50, 16, 213, 2 (e.g. driving fast through a crowded street). See Institutes of Justinian, Sandom, p. 466. 'The Aquilian law does not distinguish different degrees of culpa.' Grueber, *Lex Aquilia*, p. 222. Culpa levis (apart from culpa in concreto) answers to our prudent, careful, diligent, or skilful man in the particular situation. See Grueber, *Lex Aquilia*, pp. 223, 224.

² *Doorman v. Jenkins*, 2 Ad. & E. 256. The question, it will be seen, was not whether the defendant had taken the same care of the money that he took of his own.

stranger calls for and gets the bonds, representing himself to be S, the depositor. The judge instructs the jury that, if the defendants are guilty of want of 'ordinary care' under all the circumstances, they are liable, otherwise not. The instruction is correct, being equivalent to a ruling that the defendants are liable for gross negligence only¹. Again: The defendants receive a deposit of debentures to be kept without reward, and the cashier of the bank fraudulently abstracts the same and makes away with them. The defendants are liable if they have failed to exercise 'ordinary care,' which means a failure to exercise that ordinary diligence which a reasonably prudent man takes of his own property of the like description².

The foregoing are examples of liability in cases of bailment without reward; but the same principles govern bailments for hire. For example: The defendants, warehousemen for hire, lose by theft the plaintiff's property, while the same is in their keeping. They have exercised the care usually exercised in the vicinity by other like warehousemen. They are not liable, having exercised 'ordinary care.'³ Again: The defendants, warehousemen in a large city, receive from the plaintiffs for reward a large quantity of salt in barrels, which they store in a loose frame warehouse, situated in an alley, back of their business house. Of the whole amount about two hundred and forty barrels are stolen; and it is afterwards discovered that the theft was going on at intervals for a month. It was effected by entering through an opening in the side of the building, a plank there being off, and then opening the alley door and rolling out the barrels. Drays were thus loaded early in the morning, sometimes before sunrise, sometimes a little after; the defendants having no watchman there. The defendants are liable, because they failed to exercise 'ordinary care or diligence'; though it appears to be usual in the particular city to pile such barrels in open sheds, or on vacant lots, or on the side-walk, or occasionally in warehouses such as the one in

¹ Lancaster Co. Bank v. Smith, 62 Penn. St. 47. See also Foster v. Essex Bank, 17 Mass. 479, 486.

² Giblin v. McMullen, L. R. 2 P. C. 317; Fulton v. Alexander, 21 Texas, 148.

³ Cass v. Boston & L. R. Co., 14 Allen (Mass.), 448. See Lane v. Boston & A. R. Co., 112 Mass. 455.

question,—some supervision or examination of the premises being reasonably required in the course of a month¹.

The result therefore is, that the terms 'gross negligence' and 'negligence' are, with regard to goods bailed, now used to prescribe liability where the defendant or his servants have not taken the same care of the property intrusted to them as a prudent man would have taken of his own in the same situation². Or, as it has recently been laid down by judicial authority: For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is 'gross negligence.' What is reasonable varies in case of a gratuitous bailee and that of a bailee for hire. From the former are reasonably expected such care and diligence as persons ordinarily use (that is, careful persons) in their own affairs, and such skill as the bailee has. From the latter are reasonably expected such care and diligence as are exercised in the ordinary and proper course of similar business, and such skill as the bailee ought to have; namely, the skill usual and requisite in the business for which he receives payment³.

On the other hand, in regard to the converse question of the duty of the bailor to the bailee (which does not concern the **Gratuitous bailor.** dogma of the three degrees of negligence), it is clear that a gratuitous bailor stands in a different position from a bailor for reward. A bailor for a price may well be required to look to the safety of the bailee; but a man cannot be required to enlarge his *gift*, as he would be if he were to be held liable for defects in the chattel by which the bailee sustained damage, for to make him liable would virtually be to say that he must put the chattel in good condition before lending it. It would require some assurance in a gratuitous bailee to say to the bailor, 'I want your cart to fetch my turnips to market, but you must put it in perfect order if you let me take it.' For 'passive' negligence, i.e. a want of knowledge of defects

¹ *Chenowith v. Dickinson*, 8 B. Monroe (Kentucky), 156.

² *Briggs v. Taylor*, 28 Vermont, 180. See also *Duff v. Budd*, 3 Brod. & B. 177; *Riley v. Horne*, 5 Bing. 217; *Batson v. Donovan*, 4 B. & Ald. 21.

³ *Beal v. South Devon Ry. Co.*, 3 H. & C. 337, Exch. Ch., Crompton, J., speaking for the court.

which by care or diligence he might have known, the bailor would not be liable¹.

The contrary would be true if the bailor's negligence was 'active,' that is, if he knew of the danger and did not notify the bailee². It is then the duty of the bailor, whether the bailment be for reward or not, to notify the bailee of danger if he knows there is danger: as where a person employs another to carry an article which from its dangerous nature requires more than ordinary care; in such a case the bailor must give reasonable notice of the nature of the article, otherwise he will be liable for the natural consequences of the neglect³. For example: The defendant delivers a carboy of nitric acid to the plaintiff, servant of a Croydon carrier, to be taken to Croydon, without notifying him of the nature of the article; and there is nothing in its appearance to indicate its nature. While he is carrying it the carboy bursts from some unexplained cause, and the plaintiff is injured. The defendant is liable⁴.

§ 5. BAILMENT FOR SERVICE

Thus far of bailment for custody (*locatio custodiæ*), or for hire (*locatio rei*), or the like. The bailment may require the performance of services upon chattels (*locatio operis*); **Ordinary care.** but the rule with regard to diligence is still the same. The bailee is bound to exercise ordinary care; to wit, the care of a prudent man of the same occupation, and under the same circumstances. He is also bound to exercise a fair average degree of skill in relation to the business which he undertakes; to do his work in a workmanlike manner; and to be possessed of sufficient skill to execute it. He will therefore be liable, *prima facie*, if he should either make an engagement without sufficient skill to execute it, or if, possessing the adequate skill, he should not exercise it. For example: The defendant hires a horse of the plaintiff which becomes slightly ill. The

¹ See *Indermauer v. Dames*, L. R. 1 C. P. 274 (s. c. L. R. 2 C. P. 318). The text applies equally to gifts. *Id.*

² *Id.*

³ *Willes, J.*, in *Farrant v. Barnes*, 11 C. B. n. s. 553, 561.

⁴ *Farrant v. Barnes*, *supra*. See *Brass v. Maitland*, 6 El. & B. 470; *Clarke v. Army and Navy Co-operative Soc.*, 1903, 1 K. B. 155, C. A. (seller and buyer).

defendant, not being a farrier, thereupon prescribes improperly for the horse, and the medicine kills it. A farrier being near at hand at the time, this is a breach of duty to the plaintiff¹. Again: The defendant, a builder of houses, undertakes for the plaintiff to rebuild a good and substantial front to his house, but he builds the same so out of the perpendicular that it must be taken down. The defendant is liable in an action for negligence².

The degree of skill and care required rises in proportion to the value, the delicacy, and the difficulty of the operation. A workman employed to repair the works of a very delicate instrument, such as a great telescope, would be expected to exert more care and skill than would be required about an ordinary undertaking, such as the repair of a truck cart³. The criterion of liability however still remains the same; if all things are done by the workman which a careful and skilful workman in the same situation and business would do, he will be exonerated from liability though he break the instrument⁴.

It should be observed however with regard to cases requiring the exercise of skill, that a bailee is not to be required to possess extraordinary skill, such as is possessed by but few persons only in the particular business, but only a fair average, or ordinary, degree of skill; unless indeed he engage to possess extraordinary ability. In the absence of agreement or false representation, reasonable skill constitutes the measure of the engagement of the workman in regard to the thing undertaken⁵.

On the other hand, a bailee employed to do work unfamiliar to him is not liable, it seems, for failing to possess the requisite skill for the work, if he has not held himself out as possessing such skill. It is the bailor's fault if he intrust a work requiring the exercise of skill to one whom he knows to be without it. For example: The defendant, a matter, is employed by the plaintiff, with notice, to embroider a fine carpet, and the defendant, from want of skill,

**Employment
of unskilled
workman.**

¹ Dean v. Keate, 3 Campb. 4.

² Farnsworth v. Garrard, 1 Campb. 38.

³ Story, Bailments, § 432. Compare the Roman law. Institutes, Sandars, p. 466.

⁴ Story, Bailments, § 432.

⁵ Id. § 433.

spoils the materials put into his hands by the plaintiff for the purpose. This is no breach of duty, the defendant not having represented himself competent for such work¹.

It is further to be observed that if the loss or bad execution be not properly attributable to the fault or unskilfulness of the workman, or of his servants, but arise from an inherent defect in the thing upon which the work is done, the bailor, having furnished the materials, cannot treat the bailee as guilty of negligence². But if the materials were furnished by the bailee, and the result were a failure to perform the contract altogether, or a failure to perform it within the time agreed upon, the bailee would be liable; unless perhaps the materials required by the bailor were such as he (the bailee) was not familiar with, and he had exercised such skill as he possessed in the management of them³.

§ 6. PROFESSIONAL SERVICES

The only difference between the case presented in the present section and that in the preceding is that there is now no bailment of goods to be wrought upon. The rules of law with regard to the duty of the person employed are not materially different from those above presented, **Reasonable care and diligence.** To render a professional man liable for negligence, it is not enough that there has been a less degree of skill than some other professional men might have shown. Extraordinary skill is not required unless professed or contracted for; a fair average degree of skill is all that can be insisted on. Or, as it has been laid down, a person who enters a learned profession undertakes to bring to the exercise of his business nothing more than a reasonable degree of skill and care. He does not undertake, if an attorney, that he will gain a cause at all events, or, if a physician, that he will effect a cure⁴.

¹ Story, Bailments, § 435.

² Id. § 428 a.

³ In the latter case the bailor might himself be liable to the bailee, as in case of injury from dangerous materials ordered by the bailor.

⁴ *Lamphier v. Phipos*, 8 Car. & P. 475, Tindal, C. J.; *Hart v. Frame*, 6 Clark & F. 193, 210; *Graham v. Gautier*, 21 Texas, 111; *Dashiell v. Griffith*, 84 Maryland, 363.

For special illustration of the application of this doctrine, the nature of the liability of lawyers and of doctors of medicine for negligence may be taken.

Every client has a right to expect the exercise, on the part of his counsel¹, of care and diligence in the performance of the business intrusted to him, and of a fair average degree of professional skill and knowledge; and if counsel has not as much of these qualities as he ought to possess, or if, having them, he neglects to use them, the law makes him liable, *prima facie*, for any loss which may have been sustained thereby by his client².

Hence a lawyer possessed of a reasonable amount of information and skill, according to the duties which he undertakes to perform, and exercising what he possesses with reasonable care and diligence in the affairs of his client, is not liable for errors in judgment, whether in matters of law or of discretion, unless he profess to have a high order of skill.

It is clear however that, when an injury has been sustained which could not have happened except from want of reasonable skill and diligence on the part of counsel, the law will hold him liable. To take proceedings upon a wrong statute, where there is no question of doubtful construction involved, would be evidence of negligence under this rule. For example: The defendant, an attorney, is employed to take statutory proceedings on behalf of the plaintiffs against their apprentices for misconduct. The defendant proceeds upon a section of the statute relating to servants and not to apprentices. This is deemed such a want of skill or diligence as to render the attorney liable to repay to the plaintiffs the damages and costs incurred by his mistake³.

If a lawyer has doubt in regard to the legal effect of an instrument in which his client is concerned, and submits the question to counsel for advice on which to act, he must state the facts correctly and with fulness. If, instead of laying the facts of the case fully before counsel, he attempts to state inferences from the facts, he acts at his peril. The counsellor

¹ Other than barrister. *Purves v. Landell*, 12 Cl. & F. 91, 103.

² *Saunders, Negligence*, 155.

³ *Hart v. Frame*, 6 Clark & F. 193.

should be permitted to draw his own inferences. For example: The defendant, a lawyer employed by the plaintiff, seeking counsel of another lawyer, misstates the legal effect of certain deeds not accompanying the case, whereby he (the defendant) receives and acts upon incorrect advice, to the damage of the plaintiff. This is evidence of negligence¹.

In the like exercise of due care and skill, an attorney employed to investigate the title to an estate, or to seek out a good investment and obtain security for money advanced, must examine the title to and extent of the security offered: and even then, if the title prove obviously defective, or the security prove evidently bad or insufficient, he will be liable².

The authorities, finally, appear to establish the rule that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of court, for the want of care in the preparation of a cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of the cause as is usually allotted to his department of the profession. On the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually submitted to one in the highest walks of the legal profession³.

To render a doctor of medicine liable for negligence, there must likewise appear to have been a failure to exercise such **Doctors of** diligence or skill as a prudent practitioner of fair **medicine.** ability would have exercised under the same circumstances⁴. The degree of diligence required will be proportionate to the nature of the case; and, in some cases, nothing short of the highest degree of diligence can satisfy the law.

As regards the *skill* to be exercised however, nothing more than a reasonable degree can be insisted upon; the law does not require the exercise of the highest medical ability⁵, unless the

¹ Ireson v. Pearman, 3 B. & C. 799.

² Knight v. Quarles, 4 Moore, 532; Whitehead v. Greetham, 10 Moore, 183; Donaldson v. Haldane, 7 Clark & F. 762.

³ Godefroy v. Dalton, 6 Bing. 460. See Hart v. Frame, 6 Clark & F. 193, 210.

⁴ Dashiell v. Griffith, 84 Maryland, 363. Compare Lex Aquilia, fr. 7, § 8; fr. 8 pr.; Grueber, pp. 24, 25.

⁵ Graham v. Gautier, 21 Texas, 111.

party has held himself out as possessed of it or has contracted to give it. For example: The defendant, a physician, is retained as accoucheur to attend the plaintiff's wife, and the plaintiff alleges that he failed to use due and proper care and skill in the treatment of the lady, whereby she was injured. The judge instructs the jury that it is not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question to be decided is, whether there has been a want of competent care and skill to such an extent as to lead to the bad result¹. Again: The defendant, a surgeon, is employed by the plaintiff to treat an injury to his hand and wrist; and the plaintiff alleges that he conducted himself in the business in such a careless, negligent, and unskilful manner, that the plaintiff's hand became withered, and was likely to become useless. The judge instructs the jury that the question for them to decide is, whether they are satisfied that the injury sustained is attributable to the want of a reasonable and proper degree of care and skill in the defendant's treatment. The defendant's business did not require him to undertake to perform a cure, nor to use the highest possible degree of skill².

If the patient, by refusing to adopt the remedies of the physician, frustrate the latter's endeavours, or if he aggravate the case by his own misconduct, he, of course, cannot hold the physician liable for the consequences attributable to such action. Still if, after such misconduct, the physician continue to treat the patient, he will be liable for any injury sustained by reason of his own negligence in such subsequent treatment³. Want of consideration is by the better rule no defence⁴.

¹ *Rich v. Pierpont*, 3 Fost. & F. 35.

² *Lamphier v. Phipos*, 8 Car. & P. 475. These two cases, though at nisi prius, are often referred to as authority. Like the second is *Wood v. Clapp*, 4 Sneed (Tennessee), 65.

³ *Hubbard v. Thompson*, 109 Mass. 286; *Wharton*, Negligence, § 737.

⁴ *Gill v. Middleton*, 105 Mass. 479. But see *Ritchey v. West*, 23 Ill. 385, proceeding upon the old notion of bailment without reward.

§ 7. DUTY OF AGENTS, SERVANTS, TRUSTEES, AND THE LIKE

The test of the liability of an agent to his principal for damage done by reason of alleged negligence is, speaking generally, the conduct of a diligent or careful or skilful agent in the like situation. If the agent's action conform to this standard, he will be exempt from liability; otherwise not. But it is important to look into this rule.

Diligence,
care, and
skill.

In accordance with the general rule, it is held not necessary, in order to fix the liability of a factor to his principal for damage, to prove that the factor has been guilty of fraud or of such gross negligence as might carry with it a presumption of fraud. The factor is required to act with reasonable care and prudence in his employment, exercising his judgment after proper inquiry and precautions¹. If the exercise of ordinary diligence on his part would have prevented the loss, he will be liable; otherwise not. For example: The defendants, factors, are directed by the plaintiff, their principal, to remit in bills the amount of funds in their hands. They do so in the bills of persons who at the time are in good credit in the place in which the factors reside, though not in the place of residence of the plaintiff. If they have not notice of the latter fact, the defendants are not liable; due diligence not requiring them to make inquiry of the credit of the parties to the bills at the place of residence of the principal, when they are of good credit at the place of residence of the factors². Again: The defendants, factors, are requested to remit to the plaintiff, their principal, in bills 'on some good house in New York,' the plaintiff's place of residence. They remit in the bills of *R* and *B*, partners, drawn upon and accepted by *B*, the former residing at the place of residence of the defendants, the latter at the place of residence of the plaintiff, to the defendants' knowledge. *R* and *B* have houses of business at both places. *R* (the resident party) is in good credit at the defendants' place of residence, but *B* (the New York party) is not. The plaintiff sustains damage. The defendants are liable whether they knew *B*'s standing or not; being bound to make inquiry in regard to him³.

¹ Story, Agency, § 186.

² *Leverick v. Meigs*, 1 Cowen (New York), 645.

³ *Id.*

Extraordinary emergencies may arise in which an agent may, on grounds of necessity, be justified in assuming extraordinary powers; and his acts fairly done under such circumstances will be deemed lawful¹. Indeed it seems clear that the presence of such emergencies may not only justify, but, in the light of prudence, even demand the resort to extraordinary measures. Ordinarily, it is proper and (probably) necessary for an agent to deposit the funds of his principal in bank²; but if a hostile army were approaching the place at the time, to the knowledge of the agent, prudence would require him to make some other and unusual disposition of the funds³.

The duty of an agent employed to procure insurance is to take care that the policy is executed so as to cover the contemplated risk; and to this end he is, of course, bound to possess and use reasonable skill. The agent is also to take care that the underwriters are in good credit; though it is enough that they are at the time in good repute⁴.

What is the proper exercise of diligence and skill in such cases is sometimes a matter of great nicety. On the one hand, an agent who acts bona fide in effecting insurance for his principal, using reasonable skill and diligence, is not liable to be called to account, though the insurance might possibly have been procured from other underwriters on better terms, or so as to include additional risks, by which the principal might, in the event of loss by those risks, have been indemnified⁵. On the other hand, an agent in the like case is bound to have inserted in the policy all the ordinary risks commonly covered; and if he omit to have them inserted when a reasonable attention to his business and the objects of the insurance would have induced other agents, of reasonable skill and diligence, to have them inserted, he will be liable for negligence in case of loss⁶. And the same will be true

¹ Story, Agency, § 141; Bailments, § 83.

² Heckert's Appeal, 69 Penn. St. 264.

³ See *Wood v. Cooper*, 2 Heiskell (Tennessee), 441.

⁴ Story, Agency, § 187.

⁵ Id. § 191; *Moore v. Mourgue*, Cowp. 479.

⁶ Story, Agency, § 191; *Park v. Hammond*, 6 Taunt. 495.

if he negligently or wilfully conceal a material fact or make a material misrepresentation whereby the policy is afterwards avoided¹.

If however it should appear that, even if the duty expected had been performed with proper care, the principal could have derived no benefit therefrom, either because the result would have been contrary to express law or to public policy or to good morals, the negligence of the agent or other party acting in the matter is not a breach of duty².

Servants also are bound to take due care of their master's interests, so far as intrusted to them. If a servant be guilty of a failure to exercise such care or skill or prudence as a diligent servant would exercise under the circumstances, and the master suffer damage thereby, the servant will be liable for a breach of duty. On the other hand, the servant is not bound to prevent loss to his master at all hazards; he is only required to use the care or skill of a diligent servant. For example: The defendant, a servant, loses by theft of another the goods of the plaintiff, his master and a carrier; but there is no proof of negligence on the part of the defendant. The plaintiff must bear the loss³. Again: The defendant, treasurer of the plaintiffs, is charged with a failure to pay over to the plaintiffs specific money in his possession. He pleads that after receiving the money, and before the time when he ought to have paid it or could have paid it to the plaintiffs, he was robbed by violence of the whole amount without any default or want of due care on his part. The plea shows that the defendant has not violated his duty to the plaintiffs⁴.

If too it should appear that the principal or master, upon a full knowledge of the circumstances, has deliberately ratified the acts or omissions complained of, though without consideration, he will then be compelled to overlook the breach of duty, and cannot recall his condonation of the offence⁵.

¹ *Mayhew v. Forrester*, 5 Taunt. 615.

² *Story, Agency*, § 238.

³ *Savage v. Walthew*, 11 Mod. 135, coram Lord Holt.

⁴ *Walker v. British Guarantee Assoc.*, 18 Q. B. 277. See *Doorman v. Jenkins*, 2 Ad. & E. 256, ante, p. 316.

⁵ *Story, Agency*, § 239.

A trustee is not liable at common law for a loss which has occurred through him, if he exercised ordinary skill, prudence, and caution¹. In considering whether a trustee has made himself liable for a loss, such as one arising by reason of a failure to collect and convert into money the trust assets, regard must be had to the nature of the trust. A guardian is not in ordinary cases held to such prompt action in enforcing the collection of securities as an executor, administrator, or assignee acting for the benefit of creditors. The duty of a guardian is to hold and retain; of an executor, to collect and prepare for distribution². But it is the duty of a trustee to be active in reducing to his possession any debt forming part of the trust fund; for the consequences of neglect he would be liable³.

An administrator or executor, or an assignee of an insolvent, should within a reasonable time make proper efforts to convert all the assets and securities of the estate into money for distribution; failing to make such effort, the party is liable for any loss to the estate thereby sustained. For example: The defendant, an executor, fails for several years after the death of the testator to call in part of the personal estate left out on personal security by the testator himself. The debtor becomes bankrupt, but down to that time pays his interest regularly. Eight months afterwards, the plaintiffs, cestuis que trust, request the defendant to call in the money, but nothing can be found. The defendant is liable⁴.

If the business of the trustee be such as to involve questions of law, or such as to suggest the aid of legal counsel, due care and diligence will probably require him to obtain legal advice. But having complied, and having

¹ *Charitable Corp. v. Sutton*, 2 Atk. 400, Lord Hardwicke; *Twaddle's Appeal*, 5 Barr (Pennsylvania), 15; *Miller v. Proctor*, 20 Ohio St. 442; *Harvard College v. Amory*, 9 Pick. 446, 461; *Hunt, Appellant*, 141 Mass. 515.

² *Chambersburg Sav. Assoc. Appeal*, 76 Penn. St. 203; *Charlton's Appeal*, 34 Penn. St. 473.

³ *Caffrey v. Darby*, 6 Ves. 488.

⁴ *Powell v. Evans*, 5 Ves. 839; *Johnson's Estate*, 9 Watts & Sergeant (Pennsylvania), 107; *Chambersburg Sav. Assoc. Appeal*, *supra*.

no reason to suppose that the advice given is incompetent, the trustee will be exonerated in acting thereon. For example: The defendants, executors of an estate, under directions to invest the moneys of the estate on loan well secured, apply to a lawyer of good standing in another town concerning the security of a mill in that place, offered by a person desiring to borrow money of the defendants, and are told that the security is good; and a mortgage of the borrower's interest therein is accordingly taken. The mill however is owned by the borrower and another in partnership, and is liable for the firm debts. The owners become insolvent, and the note of a third person, well secured, is offered the defendants on condition of a release of the mortgage. By advice of the same lawyer, the offer is declined, and the mill security is lost. The defendants are not liable, having acted with the prudence of men of ordinary diligence, care, and prudence in the matter¹.

Directors of corporations are bound to exercise all the ordinary diligence of persons in the same situation²; and that may vary according to the nature of the business³. In speculative ventures, so understood by all parties concerned, a less rigid rule of prudence would be applied than in transactions not speculative; and it is laid down that in cases of the first kind 'crassa negligentia' must be shown, if the directors acted within their powers, in order to impose liability upon them⁴. Directors are not in ordinary cases expected to devote their whole time and attention to the corporation over whose interests they have charge, and are not guilty of negligence in failing to give constant superintendence to the business. Other officers, to whom compensation is paid for their whole time in the affairs of the corporation, have the immediate management. But the duties may be such as to require all the time of the directors; and whatever the office, if they undertake it they must perform it fully⁵.

In relation to such other officers, the duties of directors are

¹ *Miller v. Proctor*, 20 Ohio St. 442.

² *Overend v. Gibb*, L. R. 5 H. L. 480, 494, Lord Hatherley.

³ *Id.*

⁴ *Id.* Compare the law of deceit, ante, pp. 64-66.

⁵ *York & North Midland Ry. Co. v. Hudson*, 16 Beav. 485, 491, Romilly, M. R.

those of control; and the neglect which would render them liable for not exercising that control properly must depend upon circumstances. They are simply to exercise common diligence over those officers. If nothing, in the exercise of such diligence, has come to their knowledge to awaken suspicion concerning the conduct of the managing officers, the directors are not guilty of negligence, and hence are not liable for losses sustained by reason of the misconduct of such officers¹. Those officers are the agents or servants of the corporation, not of the directors.

If however the directors become acquainted with any fact concerning the officers of the body, calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is, it seems, required; and a failure to exercise such care, resulting in damage to the corporation or to its customers, will render the directors personally liable². And the same rule probably applies to all trustees or general officers having the oversight of subordinate officers. But generally speaking the liability of the directors or trustees in such cases is to the corporation itself and not to the individual members³.

§ 8. PUBLIC BODIES AND PUBLIC OFFICERS

The fact that public bodies or public officers may have contracted with or assumed some duty to the State or to a municipal government to perform a duty faithfully
Duty to indi- does not imply that they may not also owe special
viduals. duties to individuals in the performance of their business⁴.

¹ *Percy v. Millaudon*, 20 Martin (Louisiana), 68.

² *Brewer v. Boston Theatre*, 104 Mass. 378. Quære, if 'crassa negligentia' would be necessary to create liability in such a case? But after all 'crassa negligentia' is only negligence in the particular situation; it is 'crassa' only as compared with what might be negligence in a different situation. See *Beal v. South Devon Ry. Co.*, 3 H. & C. 337, ante, p. 318. The want of that prudence which in the same circumstances a prudent man would exercise in his own behalf is 'crassa negligentia.' Lord Hatherley in *Overend v. Gibb*, L. R. 5 H. L. 480, 494.

³ *Brewer v. Boston Theatre*, supra. It is only from necessity, and to prevent a failure of justice, that individual members of the corporation can proceed against the directors or trustees. *Id.*

⁴ *Henley v. Lyme Regis*, 5 Bing. 91; s. c. 1 Bing. n. c. 222. See *Clothier v. Webster*, 12 C. B. n. s. 790; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93.

Their duties in this respect are like those of private individuals transacting similar business; and whether they receive emoluments or not is immaterial¹. Such officers are bound to exercise the diligence which the nature of their position reasonably demands; and for a failure, resulting in special damage to any individual, they are liable to him². For example: The defendant, a municipal corporation, accepts a grant from the English Crown conveying a borough, by which it is directed to keep in repair certain sea walls. The corporation fails in this duty, and the plaintiff, a private citizen, is injured thereby. This is a breach of duty to the plaintiff³. Again: The defendant, a public inspector of meat, undertakes, in accordance with his official duty, to cut, weigh, pack, salt, and cooper, for export, a quantity of beef belonging to the plaintiff, and does the same so negligently that the meat becomes spoiled and worthless. This is a breach of duty to the plaintiff, and the defendant is liable to him in damages⁴.

An individual cannot however for his own benefit, in his own name, maintain a suit against another for negligence in the discharge of a public duty where the damage is solely to the public⁵. The reason sometimes given for this is, that great inconvenience would follow if a person violating a trust of this kind could be sued by each person in the community⁶. A better reason possibly is, that as the right infringed belongs to the sovereign, as representing the public at large, so the correlative duty is one for the breach of which the sovereign alone can sue.

Officers and agents of the general government, such as postmasters and managers of public works, are not liable for the negligence or other misconduct of their subordinates, unless the latter are the servants of the former and accountable to them alone. Government officers are however liable for the consequences

Suits by individuals.

Liability of public officers for acts of subordinates.

¹ *Mersey Docks v. Gibbs*, supra.

² See *Story*, Agency, §§ 320, 321; *Hayes v. Porter*, 22 Maine, 371.

³ *Henley v. Lyme Regis*, supra.

⁴ *Hayes v. Porter*, supra.

⁵ *Black. Com.* i. 220.

⁶ *Wharton*, Negligence, § 286; *Ashby v. White*, *Ld. Raym.* 938.

of their own negligence¹; and this covers cases of negligence with respect to the conduct of such of their subordinates as are under their supervision and guidance². For example: The defendant, a postmaster, appoints with notice an incompetent person as a clerk to the government in his post-office; and, by reason of the negligence or incompetence of such person, a letter containing \$100 belonging to the plaintiff is lost. The defendant is liable³.

Officers of the courts are liable for the injurious consequences of such official acts of their own or of their servants as are attributable to want of the care of prudent men in the same situation⁴. For example: The defendant levies upon a quantity of coal on board a vessel. The coal is left on the vessel, with the master's consent, in charge of a keeper of the defendant, and while so held the vessel is sunk during a gale, with the coal on board, to the damage of the plaintiff, for whom the levy is made. The defendant is liable if he has failed to take such steps for the safety of the coal as a careful, prudent man, well acquainted with the condition of the vessel and its location with regard to exposure to storms, might reasonably be expected to take if the coal belonged to himself⁵.

A judge however, while acting in a judicial capacity, is not liable for negligence⁶; and the same is true even of a person acting in a situation which makes

¹ *Clothier v. Webster*, 12 C. B. N. S. 790; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93.

² *Story*, Bailments, § 463; *Schroyer v. Lynch*, 8 Watts (Pennsylvania), 453; *Wiggins v. Hathaway*, 6 Barbour (New York), 632.

³ See *Wiggins v. Hathaway*, *supra*.

⁴ *Wolfe v. Door*, 24 Maine, 104; *Dunlop v. Knapp*, 14 Ohio St. 64; *Browning v. Hanford*, 5 Hill (New York), 538; *Moore v. Westervelt*, 27 New York, 234. The Roman law distinguished between cases in which a magistrate injuring property was acting in virtue of his office, and cases *contra*. Dig. 4, 2, 3, § 1; Dig. 18, 6, 14. But the greater magistrates could not be sued while they held office; aliter of minor magistrates. Grueber, *Lex Aquilia*, p. 121; Keller, *Der Römische Civilprocess*, § 46.

⁵ *Moore v. Westervelt*, 27 New York, 234.

⁶ See *Bradley v. Fisher*, 13 Wallace (Supreme Court U. S.), 335, 350; *Yates v. Lansing*, 5 Johnson (New York), 282; *Pratt v. Gardiner*, 2 Cushing (Mass.), 63.

him no more than a private arbitrator¹. Having submitted a dispute to the decision of an arbitrator, neither party can require him to exercise the skill or care of an expert, unless he has held himself out to possess it, or has agreed to exercise it. For example: The defendant, as broker, makes a contract for the plaintiff, as follows: 'Sold by order and for account of *P*, to my principal *S*, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker, to be delivered here in London—at 22s. per cwt.,' etc. This contract makes the defendant virtually an arbitrator, to determine between the parties any difference arising between them as to the quality of the raisins tendered in fulfilment of the contract, not stipulating for care or skill on the part of the defendant; and he is not liable for failing to exercise reasonable care and skill in coming to a decision, if he act in good faith, to the best of his judgment².

§ 9. PERSONAL ELEMENT IN THE DUTY

Having regard now to negligence in common form, with the standard of the careful, skilful or prudent man, it should be remarked that the failure to exercise the required care, skill or diligence may or may not be a breach of duty to one who sustains damage thereby³. The question whether there has been a breach of duty resolves itself, in reality, simply into the question, whether there has been a breach of duty to the person who complains of the damage, that is, to the plaintiff; for the statement of the duty as just put imports that the negligence may be a breach of duty, and hence a breach of duty to some particular person.

This involves two inquiries; first, who owed the supposed duty; secondly, to whom that duty was due. The answer to those two questions will cover much of the ground that remains of the subject of negligence. The general answer to the first question may be stated thus: (a) he who was personally negligent; (b) he who by his own

¹ *Pappa v. Rose*, L. R. 7 C. P. 32, 525; *Tharsis Sulphur Co. v. Loftus*, L. R. 8 C. P. 1. See *Hoosac Tunnel Co. v. O'Brien*, 137 Mass. 424.

² *Pappa v. Rose*, *supra*.

³ *Ante*, pp. 306, 308.

servant or agent was negligent; (c) he who has employed another to do improper work or proper work which is improperly done. The general answer to the second question: (a) he who was in danger from the negligence of another to whom he stands in a relation of legal right or of sufficient license; (b) he who was in danger from the negligence of another to the knowledge of the latter. These general answers will now be the subject of specific examination, in their order; the first two parts (a) and (b) of the first question being passed over and giving place to the third as the one requiring special consideration. The third part (c) relates chiefly to the employment of independent contractors and to kindred matters.

§ 10. INDEPENDENT CONTRACTORS: CONTROL: 'COLLATERAL' NEGLIGENCE

A man may employ another to do work for him on a footing of independence on the part of the latter, concerning ways and means, subject only to the terms of the bargain made, and free accordingly from control by the employer. The person so employed is therefore neither the servant nor, legally speaking, the agent of the one who has employed him. This will be true of all cases of the kind, whatever the business, and however humble; at least in sound principle. Independence of the employer in ways and means is inconsistent with the relation of master and servant or principal and agent; for such relations in themselves, as we have elsewhere seen¹, are relations of dependence, at least in the sense of a right in the employer to interfere and direct at all times.

In former times this distinction was not always clearly grasped, with the result that the employer was sometimes held liable for the consequences of negligence by persons who are now commonly called independent contractors, as if they were servants or agents². But the better view finally prevailed, and such cases were put upon a footing

Independent contractor distinguished from servant or agent.

The distinction formerly overlooked.

¹ Ante, pp. 34, 39.

² *Bush v. Steinman*, 1 Bos. & P. 404; *Hilliard v. Richardson*, 3 Gray (Mass.), 349.

of their own. The employer accordingly is held not liable for damage where the contractor, whether personally or by his servants, was guilty of negligence as a mere matter of detail in the course of the employment, as he would be if the contractor was a servant or an agent of his. This is now the settled doctrine on both sides of the Atlantic¹. For example: The defendant employs a competent independent contractor to repair his chimneys; the latter having entire control over the details of the work, though the former retains the right of control over the premises. In the course of the work, by the negligence of the defendant's servants, bricks fall from the building upon which the work is going on, and hit and injure the plaintiff. The defendant is not liable². Again: The defendant, a telephone company, employs an independent contractor to connect with lead and solder certain tubes through which the wires run. To do this it is necessary to create a flare from a benzoline blow-lamp, and the flare cannot be made without applying heat to the lamp. A servant of the defendant uses for the purpose a lamp which he should have known was defective. To heat the lamp quickly, he dips it into a pot of molten solder, whereupon, because of the defect in the lamp, an explosion takes place, and the plaintiff, passing by, is hurt. The defendant is not liable³.

On the other hand the employer will be liable for the negligence of the independent contractor, or of his men, where the employer employed the independent contractor to do improper work, or to do proper work which is improperly done in the

¹ *Reedie v. London & N. W. Ry. Co.* (*Hobbit v. The Same*), 4 Exch. 244; *Brown v. Accrington Cotton Co.*, 3 H. & C. 511; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 341, 352, C. A.; *Tenny v. Wimbledon District Council*, 1899, 2 Q. B. 72, C. A.; *Holliday v. National Telephone Co.*, 1899, 1 Q. B. 221. See ante, pp. 39, 40; *Bonaparte v. Wiseman*, 89 Maryland, 12; *City R. Co. v. Moores*, 80 Maryland, 352; *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207; *Boomer v. Wilber*, 176 Mass. 482; *Hilliard v. Richardson*, supra; *Connors v. Hennessey*, 112 Mass. 96; *Gorham v. Gross*, 125 Mass. 232, 240; *Sturges v. Theological Education Soc.*, 130 Mass. 414; *Harding v. Boston*, 163 Mass. 14; *Cuff v. Newark R. Co.*, 6 Vroom (New Jersey), 17.

² *Boomer v. Wilber*, supra. The negligence was, said the court, in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held.

³ *Holliday v. National Telephone Co.*, supra. Wills, J.: 'If common care had been used, there was no danger to any one in the work ordered by the defendant to be done.'

sense of being a bad job. The two kinds of negligence may together be called *vice in the work*¹. For example: The defendant employs an independent contractor to construct a building of stone, with walls insufficient in prudence to support such a building. The building falls for that reason before it is completed, and the plaintiff sustains damage thereby. The defendant is liable². Again: The defendant employs an independent contractor to construct a party-wall between his land and land of the plaintiff, half on the land of each. After the completion of the wall, it falls because of defects in its construction, and the plaintiff suffers damage thereby. The defendant is liable³.

This proceeds upon the ground that the duty undertaken by the contractor is really a duty resting upon the employer; and resting upon the employer, it cannot be delegated by him to another without the consent of the person or persons, usually the public, to whom he owes the duty⁴. Thus the employer, if he will have a wall built or a drain made, owes the duty to others to have a good and sufficient wall or drain constructed,—a wall that will stand so far as proper construction can make it stand, a drain that will carry off its contents properly. He owes this duty to all persons who may be affected by the construction of a bad wall or drain, in other words by a *vice in the work*; and he does not rid himself of the duty by employing an independent contractor to do the work, for that is no consent, by the persons harmed, to a bad job.

It will be observed that the duty in question is a duty of one in *control*, not to be negligent therein, rather than the general duty not to be guilty of negligence. The employer, when liable for the independent contractor's negligence, is liable

¹ See cases in note I, p. 335.

² See the doctrine of *Hughes v. Percival*, 8 App. Cas. 443, and *Bower v. Peate*, 1 Q. B. D. 321.

³ *Gorham v. Gross*, 125 Mass. 232. Gray, C. J.: 'Where the very thing contracted to be done is imperfectly done . . . the employer is responsible for it.' The distinction is between 'negligence in a matter collateral to the contract and' cases 'in which the thing contracted to be done causes mischief.' *Bona-partie v. Wiseman*, 89 Maryland, 12, 21. See also, for the ground of the rule, *Hughes v. Percival*, *supra*; *Ohio R. Co. v. Morey*, 47 Ohio St. 207, 214; *City R. Co. v. Moores*, 80 Maryland, 352.

⁴ *Hughes v. Percival*, *supra*.

because he cannot divest himself of the duty to exercise control over having a job done that shall be safe to others. He has the right to see that the contractor does not undertake or turn out a dangerous piece of work; for that purpose he is in control, or rather has the *power* of control, over the work, notwithstanding the fact that he has committed the work to an independent contractor. The employer could, for instance, put a stop to the contractor's creating a nuisance of the work; the contractor is in control, at most, only so far as he keeps to a contract which is itself proper.

But in a case of negligence of the first kind spoken of, negligence, that is to say, by the independent contractor (or his **Collateral negligence.** men) merely, in the course of the employment, and not due to any vice in the work or undertaking, the employer is not in control; it is only a matter of ways and means, of which the contractor is dominus. Negligence of this kind has come to be called 'collateral' negligence¹. The distinction between cases of collateral negligence and vice in the work rests on the general theory of duty, observable danger which one may avoid². Collateral negligence is not to be expected by the employer; hence danger is not observable. It is plainly otherwise of vice in the work in either of its forms; danger is observable and harm may be avoided.

It may be difficult sometimes to determine whether the employer has retained the power to control the person employed, **Difficulties of the doctrine.** in the absence of terms of control in the contract; and there may accordingly be doubt in regard to the soundness of some of the decisions, especially in regard to cases of humble employment³. But such decisions do not impeach the principle. There may possibly be another difficulty

¹ The term was first used by Lord Blackburn, in *Dalton v. Angus*, 6 App. Cas. 740, 829, and has been adopted in the recent English cases and in many American. See *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 342; *Bonaparte v. Wiseman*, 89 Maryland, 12, 21; *Ohio R. Co. v. Morey*, 47 Ohio St. 207; *Gorham v. Gross*, 125 Mass. 232, 240. The subject of the present chapter being negligence, we do not here consider cases of illegal works. See for such cases ante, p. 40.

² Ante, p. 12.

³ E.g. *Bracket v. Lubke*, 4 Allen (Mass.), 138, where a carpenter employed to repair an awning is called and treated as a servant of the employer. But

in cases in which, while the contractor's calling is naturally an independent one, restrictions are placed upon it which give the employer, or another as his agent, for instance an architect, power at any time to stop, or change, or direct the work. But until the employer exercises his rights under the restriction, the case doubtless stands as if the restriction were not named, and the employer will then be liable or not in accordance with the rules already stated. For damage due to collateral negligence by the contractor the employer would not be liable¹.

What has been said in the foregoing paragraphs applies equally to the question of the liability of the employer, or of the contractor, for the negligence of a sub-contractor².

Sub-contractors. Liability for *collateral* negligence in such cases has been put thus: 'In ascertaining who is liable for the act of a wrongdoer you must look to the wrongdoer himself, or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable³.'

The doctrine of control leads to some kindred questions. Is the independent contractor himself liable for vice in the work after he has turned over the work to his employer⁴?

New questions raised. Is a vendor of chattels liable to persons other than the buyer from him, for his own negligence? Is a landlord of leased premises liable to third persons who have suffered damage by reason of any negligent state of the same? These questions in order.

surely the carpenter's vocation is 'independent.' See *Connors v. Hennessey*, 112 Mass. 96. This case lays down a general test of independence; which perhaps should not be taken very strictly.

¹ *Frassi v. McDonald*, 122 California, 400. See *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, which perhaps is a case of the kind; but it was decided on the ground that there was a vice in the work. So also *Hughes v. Percival*, 8 App. Cas. 443.

² *Rapson v. Cubitt*, 9 M. & W. 710; *Overton v. Freeman*, 11 C. B. 867; *Murray v. Currie*, L. R. 6 C. P. 24; *Cuff v. Newark R. Co.*, 6 Vroom (New Jersey), 17; *Bigelow's L. C. Torts*, 657.

³ *Murray v. Currie*, L. R. 6 C. P. 24, 27, Willes, J.

⁴ Of course he remains liable for any collateral negligence of his, until the Statute of Limitations exempts him.

§ 11. COMPLETION OF WORK: SALE OF CHATTEL: LEASE OF PREMISES

The independent contractor has completed the wall, the drain, the elevator, the gallery, the amphitheatre, the tenement house, and turned over the work to the employer, who accepts it; there is a vice in the work which now causes damage to another; is the contractor liable? If he has contracted for a right of inspection, he may well be; for the right to inspect (and amend, which follows) should give him sufficient power of control, unless perhaps the intervals of inspection are so far apart or are hampered by such restrictions as to make the right but nominal. But it should be observed that the contractor's liability rests at the same time upon the assumption that the damage happens to one entitled to exemption from harm by the vice in the work; which is only another way of saying that the contractor must have owed a duty to the particular person hurt.

Vice in the work turned over: inspection.

Circuity of action.

But suppose that the contractor has no right to inspect? It may be suggested that the contractor will still be liable for the sake of preventing circuity of action. The owner is liable to the person hurt, and the contractor is (or may be) liable over to the owner; therefore the contractor is liable to the person hurt—so would run the argument. But the soundness of the suggestion may be doubted. To make the contractor's liability turn upon his liability to the employer would be to make it subject to any discharge which the employer might see fit to grant him¹. The test should be, whether the contractor owes a duty to the plaintiff; if he does owe the duty, there is no place for the doctrine of circuity of action; if he does not, no notion of preventing circuity should make him liable.

The case should then stand upon the doctrine of duty. Duty the contractor owed to the plaintiff while the work was in his hands; and that duty he could not then or afterwards *delegate* to the owner in the sense of getting rid of it himself, towards a third person,

Delegation of duty: extinction of duty.

¹ The contractor's liability may come to an end when the work is done and turned over, it will be seen; but that is a different thing from making it subject to the will of the employer.

while otherwise (i.e. apart from the delegation) subject to it. So long as the duty exists, it cannot be delegated, so as to divest the person owing it of its binding force, without the consent of the person to whom it is owed. But a duty may be *extinguished* in certain ways without such person's consent. Whether completing and turning over the work extinguishes the duty will perhaps turn upon the question whether the vice in the work was intended, or what in the way of negligence comes to the same thing, was due to reckless or wanton disregard of rights¹. Probably the duty is extinguished, on completion of the work, where the negligence of the contractor was passive, that is, where he did not in fact know of the vice in the work, though he ought to have found it out. The property is by the hypothesis now entirely out of the contractor's control, and may be sold again and again, and if it be a chattel may be carried away and disappear until the contractor, if liable, is called upon for damages.

The next question is of the liability of the vendor of a chattel to one who did not buy from him, for damage caused by his negligence in respect of the chattel. This question usually arises in relation to the effect of the chattel's passing through other hands before it reaches the plaintiff, and in that aspect is considered further on². It will perhaps be enough at this place to say that for negligence in the sense of want of due care, that is, want of knowledge when one should know, or passive negligence, and that *alone*, the vendor's liability does not extend to others than the buyer and those who, according to the clear purpose of the seller and the buyer³, are to use the chattel. The sale and delivery of the chattel puts the article out of the seller's control and also, in cases of mere passive negligence, destroys the duty; unless the very dangerous nature of the chattel imposes a special duty upon the vendor,—of which in another section⁴.

¹ Compare *Maynard v. Boston & M. R. Co.*, 115 Mass. 458, Gray, C. J.; *Southcote v. Stanley*, 1 H. & N. 247, Bramwell, B.

² *Infra*, § 16.

³ Compare *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338, a case of misrepresentation. See *Heaven v. Pender*, 11 Q. B. Div. 503, 516.

⁴ *Infra*, § 16.

The last question is of the liability of a landlord of leased premises to third persons who have suffered damage by reason of the defective condition of the premises, due to negligence. But it must first be asked, whose negligence it was, the landlord's or the tenant's? unless it was the negligence of both. For if the landlord was not negligent, he cannot, it seems, be liable for the negligence of a tenant over whom he has no control¹. There certainly may be negligences touching the premises for which the landlord, not being in control or having notice, cannot be responsible, as for leaving open a scuttle in a sidewalk for half-an-hour.

It may be however that the damage was caused by a condition of the premises for which the landlord would be liable to the plaintiff regardless of the question whether the premises were let and out of his possession. Thus the damage may have been caused by the defective condition of the eaves of a house overhanging the street, whereby pipes fall from the same and strike one passing along in the highway. The landlord would be liable in such a case, if he had notice that the premises were in that state; for the owner of premises owes to the public, and to every member thereof, the duty to have his premises in safe condition for those who are passing in the highway, so far as by diligence he can. The highway must be safe and the landlord must not negligently make it unsafe, or after notice permit it to remain unsafe even in the hands of his tenant. He does not get rid of this duty by leasing his premises and thus putting them out of his hands. He would no doubt have sufficient power of control to enter and repair, unless the lease forbade; but even if the lease took away his right of repair he would be liable, because he could not get rid of his duty to the plaintiff by contract with the tenant². Sale alone would put an end to his duty.

¹ Query of tenancy at will? The landlord may put an end to the lease, but otherwise he has no control over the premises. While the tenancy continues the landlord has no more control or power of control than he would have if the tenancy were for a term of years. It should seem therefore that the text covers such cases.

² The duty to repair rests, in the absence of stipulation otherwise, on the tenant; and the tenant being accordingly bound to repair is liable for the neglect, whether the landlord is also liable or not. See *Lowell v. Spaulding*, 4 Cushing (Mass.), 277; *Fisher v. Thirkell*, 21 Michigan, 1.

It is not clear, where the premises fell into disorder by the negligence of the tenant alone, whether the landlord would be liable for damage done before having notice of the state of things. Probably he would not be, because the duty of control, which includes the duty of repair, appears to be a duty not to be guilty of negligence in the matter; the duty of control is not neglected if there be no reason to suppose that anything is wrong.

It will be seen from what has already been said that the common way in former times of putting the rule of liability in cases of landlord and tenant, to wit, that the landlord is liable if the defective condition of the premises was due to his negligence, though true in certain cases¹, is too broad. Still, while it is true that the tenant is or may be² liable if he was negligent in the matter, the landlord also may be liable; enough that the landlord as well as the tenant owed a duty to the person suffering damage. And in cases in which the landlord has assumed, what apart from contract would rest upon the tenant, the duty of ordinary repair, the landlord will, it seems, be liable for the negligence of the tenant alone, touching repairs (though not for the tenant's negligence in other respects)³; but in principle not, even in such a case, to customers or guests of the tenant, for to them he owes no duty of the kind under consideration.

The question of liability will be complicated where there is a mixed tenancy between the landlord and tenant, or perhaps where the landlord has let a building in parts to several tenants with common entrances, hallways, and the like⁴. In the first of the two cases it seems that where the plaintiff was not hurt by reason of any duty (such as that of

¹ See *Miller v. Hancock*, 1893, 2 Q. B. 177, C. A.; *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311; *Todd v. Flight*, 9 C. B. N. S. 377; *Fisher v. Thirkell*, 21 Michigan, 1.

² The tenant would not be liable if he owed no duty to the plaintiff, as where the latter entered only as a customer or guest of the landlord.

³ See *Fisher v. Thirkell*, *supra*; *Lowell v. Spaulding*, 4 Cushing (Mass.), 277.

⁴ *Miller v. Hancock*, 1893, 2 Q. B. 177, C. A. See *Lane v. Cox*, 1897, 1 Q. B. 415, C. A., *supra*; *Gordon v. Cummings*, 152 Mass. 513; *Marwedel v. Cook*, 154 Mass. 235. Or where a railway company has let its property and yet kept control of the running of the cars. *Chesapeake R. Co. v. Howard*, 178 U. S. 153.

keeping the premises safe for persons passing in the highway) which the landlord owed to the public, the general test of the landlord's liability is whether the plaintiff entered on business with him or by his invitation. If the plaintiff entered on business with, or by invitation of, the tenant, the tenant alone is liable, if either is¹. As for the case of a building let in parts to several persons, with right to use common entrances and hallways, it may well be that the landlord, by assuming the duty of care over such places, should be held liable for the defective condition of them to customers of the tenants²; but that is a question of the person to whom the duty of care is due, rather than of the person who owes the duty³.

It has been suggested that the landlord's liability for his tenant's negligence, where he is liable for it, rests upon the ground of preventing circuity of action⁴. But that may be doubted, as in the matter before considered⁵, except in regard to cases in which the landlord has assumed the duty of the tenant to make ordinary repairs. The true ground in general appears to be the duty of the landlord to the plaintiff; the question of liability accordingly being direct.

We come now to the second general question, to whom the duty is due⁶.

§ 12. CARE OF PREMISES

In this section the duty of the owner or occupant of premises to the *plaintiff*, for damages sustained thereon, by reason of the condition of the premises, is to be stated. The **Division of the subject.** question of the existence and nature of the duty turns more or less upon the consideration of the occasion which brought the plaintiff there; that is, whether the plaintiff was a trespasser, a bare licensee, an invited licensee, a customer-licensee, or a licensee by law⁷. The question must therefore be considered with reference to each of these situations.

The owner or occupant of premises owes no duty of care or

¹ See *Lane v. Cox*, *supra*; *Roche v. Sawyer*, 176 Mass. 71.

² See *Miller v. Hancock*, 1893, 2 Q. B. 177, C. A.

³ *Post*, p. 356.

⁴ *Lowell v. Spaulding*, 4 Cushing (Mass.), 277.

⁵ *Ante*, p. 339.

⁶ *Ante*, p. 333, § 9.

⁷ For the case of servants, see § 13.

diligence to keep his premises in repair for the purposes of trespassers. In other words, it is no breach of
Trespassers: duty to a trespasser that a man's premises were,
due care:
wantonness. by reason of his 'passive' negligence¹, in a dangerous state of disorder, whatever the consequences to the former. But this rule of law must not be understood as declaring that the occupant or owner owes *no* duty to trespassers with regard to the management of his premises. He has no right even towards such persons to maim them, as by savage beasts, hidden guns, or missiles². For example: The defendant has a savage dog on his premises, which he knowingly allows in the day-time to run at large unmuzzled, having notice that the dog is savage. The plaintiff, having strayed upon the premises without permission, while hunting, is attacked and bitten by the dog. The defendant is deemed liable³. Again: The defendant sets a spring-gun in his grounds to 'catch' persons entering thereon without permission, and fails to give notice of the particular danger. The plaintiff while trespassing on the premises is injured by the gun, having no notice of danger. The defendant, apart from statute, is liable⁴.

More than that, while the owner of premises is not bound to exercise care or diligence to keep his premises in repair for trespassers, he does owe the duty, even to such persons, not to suffer them to receive harm by reason of any improper condition of them if he knows that a trespasser is in danger thereby and can give him warning. For the owner, with knowledge that a

¹ Ante, p. 308.

² *Talmage v. Smith*, 59 N. W. Rep. 656 (Michigan). Compare *Lex Aquilia*, fr. 9, § 4, that to throw a missile at a slave and hit him is actionable, though the slave should not have been where he was. So also, it seems, though the thrower was trying only to show his dexterity in not hitting the slave. Grueber, *Lex Aquilia*, pp. 31, 32; 'nam lusus quoque noxius in culpa est.' *Lex Aq. fr.* 10 pr.

³ *Loomis v. Terry*, 17 Wendell (New York), 496, an extreme case.

⁴ *Bird v. Holbrook*, 4 Bing. 628. See *Clark v. Chambers*, 3 Q. B. D. 327, 333. As to notice now, see 24 & 25 Vict. c. 100, § 31. If, in the absence of statute, the trespasser had knowledge of the existence of the danger, or if a man entered in the night-time with a felonious intent, he (probably) 'assumed the risk' (see post, § 13) and could not recover; though even in such cases the owner of the premises would not be justified in purposely inflicting greater harm than would be necessary for the protection of his property and the expulsion of the intruder. See the two cases just cited; also *Ilott v. Wilks*, 3 B. & Ald. 308; *Woolf v. Chalker*, 31 Connecticut, 121; ante, p. 227.

person is in danger of harm from fault of his, the owner's, to do nothing, would show want of ordinary regard for, in other words, wanton or reckless disregard of, the person's safety, one of the forms of negligence already referred to¹. In such a case, that person would have a legal right to proper warning, which, but for the owner's knowledge of his danger, he would not have apart from statute or from some intended menace to safety by the owner². The sort of negligence for which the owner is not liable to trespassers, want of care or diligence in regard to the condition of his premises, is accordingly passive negligence; the sort for which he is liable, active negligence³.

A bare licensee, as the term is here used, is one who enters another's premises, or is upon some particular part of the same⁴,

Who are without request or inducement of the occupant,
meant by but still under circumstances from which he has
barelicensees: come to suppose a permission; as in the case of
duty to such. persons accustomed, without interference, to cross
 a line of railway in no definite track⁵, or possibly of persons
 crossing an open field on a footpath, commonly used by the
 neighbours, but without any right of way⁶. A person so doing,
 though not in a position to require the owner or occupant of the
 land to exercise care in regard to the management or the state
 of the premises⁷, occupies probably a more favourable position

¹ *Maynard v. Boston R. Co.*, 115 Mass. 458, Gray, C. J.; *Claridge v. So. Staffordshire Tramway Co.*, 1892, 1 Q. B. 422, fast driving. See ante, p. 307.

² See *Bird v. Holbrook*, supra, and the note following, and compare cases of gift, loan, or bailment of chattels which are defective or otherwise dangerous; the giver, lender, or bailor not being liable for damage unless he knew of the danger and did not give warning. *Coughlin v. Gillison*, 1899, 1 Q. B. 145, C. A.; *Indermauer v. Dames*, L. R. 1 C. P. 274 (s. c. L. R. 2 C. P. 318); *Farrant v. Barnes*, 11 C. B. n. s. 553, 564; ante, p. 319. If the act was a mere gratuity, the owner could not be required to enlarge his gift by making the chattel perfect; the most that could be demanded would be that he should give warning if he knew of the danger.

³ Ante, p. 308, as to these terms, and see *Southcote v. Stanley*, 1 H. & N. 247, Bramwell, B., as to the second.

⁴ See *Batchelor v. Fortescue*, 11 Q. B. D. 474.

⁵ *Harrison v. Northeastern Ry. Co.*, 29 L. T. n. s. 844.

⁶ *Morrow v. Sweeney*, 38 N. E. Rep. 187 (Indiana).

⁷ *Batchelor v. Fortescue*, 11 Q. B. D. 474; *Harrison v. Northeastern Ry. Co.*, 29 L. T. n. s. 844; *Johansen v. Davies*, 57 L. J. Q. B. 392; *Sweeny v. Old Colony R. Co.*, 10 Allen, 368.

than a trespasser. He can, of course, insist that the occupant shall let loose no savage beast upon him, set no traps in his way without giving him fair notice¹, or cause him to suffer harm there, knowing that he is in danger². But further it should seem that, if it were usual for people to pass over the occupant's premises in the night-time, he could require the occupant to exercise reasonable care with regard to the keeping of vicious animals, of whose propensity to do harm the occupant has notice.

And it may be that some special duty has been assumed by the occupant, or has been imposed by law upon him, as in the case of a railway company to sound a whistle at certain places, or to keep gates shut while trains are passing; this too would modify the question of liability³. For example: The defendant, a railway company, has a rule that a whistle shall be sounded by express trains at a certain point where, with the acquiescence of the company, persons are accustomed to cross its track. The plaintiff's intestate attempts to cross at the point in the night, while a train is standing still in such a position, according to some of the evidence, as to prevent any one from seeing an approaching express train, and is run over and killed. There is evidence, but it is contradicted, that a whistle was duly sounded, and there is evidence that the train carried lights. A jury may find the defendant guilty of breach of duty to the deceased⁴.

A bare licensee can insist upon the occupant's keeping his premises in a safe condition in another particular. A man has no right to render the highway dangerous or less useful to the public than it ordinarily is; if he should do so, he is liable as for a nuisance to any one who has suffered damage thereby⁵. And a bare licensee on the wrongdoer's premises will be entitled to recover for any damage sustained thereby. For example: The defendant digs a pit adjoining the highway, and fails to fence it off from the street. The plaintiff, while walking along

¹ See *Hart v. Cole*, 156 Mass. 475, 477.

² *Southeote v. Stanley*, 1 H. & N. 247.

³ *Dublin & Wicklow Ry. Co. v. Slattery*, 3 App. Cas. 1155; *Northeastern Ry. Co. v. Wanless*, L. R. 7 H. L. 12, as to open gates; *Williams v. Great Western Ry. Co.*, L. R. 9 Ex. 157, open gates.

⁴ *Dublin & Wicklow Ry. Co. v. Slattery*, *supra*. See also *Davey v. Southwestern Ry. Co.* 12 Q. B. Div. 70, affirming 11 Q. B. D. 213; *Gray v. Northeastern Ry. Co.*, 48 L. T. N. S. 904.

⁵ *Ante*, p. 281, note.

the street, in the dark, accidentally steps a little aside in front of the pit and falls into it, thereby sustaining bodily injury. The defendant's act in leaving the place unguarded makes it a public nuisance, and he is liable for the injury received by the plaintiff¹.

If however the pit, though near, were not substantially adjoining the highway, so that the plaintiff must have been a trespasser before reaching it, he could not treat the omission of the defendant to fence as a breach of duty. For example: The defendants being possessed of land near to an ancient common and public footway, construct a reservoir for receiving the back-wash of water at the lock of a canal owned by them. The plaintiff's intestate sets out by night along this footpath for Sheffield. The path runs alongside the canal for about three hundred yards to a point at which it is bounded on one side by a lock, and on the other by the reservoir. At this point the pathway turns to the right over a bridge, crossing the by-wash. A person continuing straight on in the direction of the pathway, and not turning to the right to go over the bridge, would find himself (if not prevented by the arm of a lock) upon a grassy plat about five yards long by seven broad, between the lock and the by-wash, level with, but somewhat distant from, the footpath; the plat being unfenced, and having a fall of about three yards to the water. On the morning following the setting out of the deceased he is found drowned at this point. The defendants are not guilty of a breach of duty in not fencing the place, since it is not substantially adjoining the highway, and the deceased must have become a trespasser before reaching the reservoir².

The same will be true of injury sustained by straying cattle or horses³. For example: The defendant digs a pit in his waste

¹ *Barnes v. Ward*, 9 C. B. 392. But see contra, *Howland v. Vincent*, 10 Met. 371, in which however the point appears to have been overlooked that the defendant's act amounted to a public nuisance. And see *Damon v. Boston*, 149 Mass. 147.

² *Hardcastle v. South Yorkshire Ry. Co.*, 4 H. & N. 67. See *Dinks v. South Yorkshire Ry. Co.*, 3 Best & S. 244; *Houndsell v. Smyth*, 7 C. B. n. s. 731; *Piggott*, Torts, 236.

³ *Blyth v. Topham, Croke*, Jac. 158; *Maynard v. Boston & M. R. Co.*, 115 Mass. 458.

land within thirty-six feet of the highway, and the plaintiff's horse escapes into the waste and falls into the pit and is killed. The defendant has violated no duty to the plaintiff¹. Again: The plaintiff's horse strays upon the defendant's railway track and is killed by negligence (short of wantonness, i.e. active negligence) of the defendant's servants. The defendant is not liable².

If the licensee entered or acted by direct invitation of the occupant, the situation may become very different. In such cases the occupant owes a duty to the licensee, not merely to restrain his ferocious animals, and to prevent injury from dangerous concealed engines, and to guard against nuisances adjoining the highway, but also, unless the invitation was for mere hospitality or benevolence or friendship, to keep his premises in reasonable repair, i.e. to refrain from negligence generally; otherwise, he will be liable for any injury sustained by the licensee, not caused by the latter's own act. In other words, the owner or occupant is bound, except in cases of hospitality or the like, to exercise reasonable care to prevent damage from unusual danger, of which he has or ought to have knowledge.

This is true even in respect of gratuitous privileges touching public and quasi-public ways, such as railways and roadways for entering one's premises. For example: The defendants, a railroad corporation, have a private crossing on their land over their railroad, at grade, in a city, which crossing they have constructed for the accommodation of the public; and they keep a flagman stationed there to prevent persons from crossing when there is danger. The plaintiff coming down the way to the crossing with horse and waggon is signalled by the flagman to cross, and on proceeding, according to the signal, to cross the track, is run against by one of the defendants' engines: the flagman having

¹ *Blyth v. Topham*, supra.

² *Maynard v. Boston & M. R. Co.*, supra. See *Taft v. New York R. Co.*, 157 Mass. 297. See however *Charnan v. Southeastern Ry. Co.*, 21 Q. B. Div. 524, under Statute. Wanton injury in such cases would create liability. *Maynard v. Boston & M. R. Co.*, supra; *Eames v. Salem R. Co.*, 98 Mass. 560; ante, p. 307.

been guilty of carelessness in giving the signal. This is a breach of duty, and the defendants are liable for the damage sustained¹. Again: The defendant, owner of land, having a private road for the use of persons coming to his house, gives permission to a builder engaged in erecting a house on the land, to place materials on the road. The plaintiff, having occasion to use the road in the night, for the purpose of going to the defendant's residence, runs against the materials and sustains damage, without fault of his own. The defendant is deemed liable; having held out an inducement to the plaintiff².

The gist of liability in such cases consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that the way was intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but was in accordance with the intention and design with which the way was adapted and prepared or allowed so to be used³. The real distinction therefore is this: A mere passive acquiescence by an owner or occupier in the use of a way over his land by others may involve no liability for negligence; but if, directly or by implication, he induce persons to enter upon his roadway for purposes not merely of hospitality or the like, he thereby assumes an obligation to keep it in a safe condition, suitable for such use, and must not be guilty even of passive negligence. For a breach of this obligation he is liable in damages to a person injured thereby⁴.

It was urged in the authority in which this doctrine was laid down (a point worthy of notice here) that if the defendants were liable in such a case, they would be made to suffer by reason of the fact that they had taken gratuitous undertakings. precautions to guard against accident at a place which they were not bound to keep open for use at all, and that the case

¹ *Sweeny v. Old Colony R. Co.*, 10 Allen (Mass.), 368. See *Holmes v. Drew*, 151 Mass. 578. As to the discontinuance of a gatekeeper see *Cliff v. Midland Ry. Co.*, L. R. 5 Q. B. 258.

² *Corby v. Hill*, 4 C. B. N. S. 556.

³ *Sweeny v. Old Colony R. Co.*, supra, Bigelow, C. J.

⁴ *Id.* See also *Bolch v. Smith*, 7 H. & N. 736, 741.

would thus present the singular aspect of a party liable for neglect in the performance of a duty voluntarily assumed, and not imposed by law. The answer was, that this was no anomaly. If a person, it was observed, undertake to do an act, or to discharge a duty, by which the conduct of others may properly be regulated, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed shall not suffer loss or injury by reason of his negligence¹. The liability in such cases does not depend upon the motives or considerations which induced a party to take upon himself a particular duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed². In other words, one may in certain cases be compelled to enlarge one's gift; the only help being not to make the gift.

It should be noticed however that this doctrine, as applied to gratuitous permission and invitation, appears to be limited to special objects, such as private crossings over railways, and private roadways, which men have been led to suppose that they have a right to use. Having led the plaintiff so to act, the defendant cannot say that the plaintiff was only a licensee. The subject appears indeed to have started on the broader basis, that invitation, if actual, created of itself a duty to have the premises in fit condition for the purpose, so far as might be by due care or diligence³; but legal theory has changed, and the doctrine has been limited to cases like those just mentioned⁴. Very likely those cases are only examples of the limitation.

¹ See *Dublin & Wicklow Ry. Co. v. Slattery*, 3 App. Cas. 1155; *Cliff v. Midland Ry. Co.*, L. R. 5 Q. B. 258. So by the Roman law, Grueber, *Lex Aquilia*, p. 24—'It is obvious that the surgeon might have rendered his services without being asked to do so . . . This however would not substantially affect the decision in the text,' that a surgeon (employed) is liable for damage due to want of skill.

² *Sweeny v. Old Colony R. Co.*, *supra*, Bigelow, C. J.

³ See *Sweeny v. Old Colony R. Co.*, *supra*, Bigelow, C. J.; *Gordon v. Cummings*, 152 Mass. 513, 515, Devens, J.

⁴ *Plummer v. Dill*, 156 Mass. 426; *Hart v. Cole*, *id.* 475, 478. These cases accordingly distinguish *Sweeny v. Old Colony R. Co.*, *supra*, and like decisions.

In relation to other cases it is now held that regard must be had to the nature of the invitation. If the licensee is invited only as a guest or friendly visitor or for benevolence, he enters on no better footing, so far as the present question is concerned, than if he were a bare licensee; he cannot hold the owner or occupant to any duty of care or diligence beyond giving notice of any danger of which he is aware¹. Difficulty will sometimes arise in determining the nature of the invitation,—whether it is one purely of hospitality or benevolence, or not; for it will occasionally happen that other motives, perhaps stronger ones, will be united with the first, as for instance where the harm befel the plaintiff at a corner-stone laying, or at a college celebration, a religious conference², or the like. But it seems that, where there is an element of benefit expected by the owner of the premises or other licensor, the invitation carries with it the duty not to be guilty of negligence in regard to danger known to him.

Where the harm arises by reason of a defective condition of the occupant's premises, it must be shown that the occupant knew or might well have known of the defect before the damage was sustained³. For example: The defendant is proprietor of a hotel, containing in one of the passage-ways a glass door, the glass in which has gradually become loosened and insecure; but the defendant is not aware of the fact, nor is he in fault for not knowing it. The glass falls out as the plaintiff opens the door, and the plaintiff, a visitor merely, is injured. The defendant is not liable⁴.

The case of a person entering upon the premises of another as a customer, on purposes of business, is a stronger one against the occupant than that of a person invited to enter for hospitality, friendship, or benevolence. A greater degree of care ought to be taken to protect such a person than one to whom only an invitation was given. This is

¹ See the cases just cited.

² See *Davis v. Central Congregational Soc.*, 129 Mass. 367, an extreme case of the kind.

³ *Welfare v. London & B. Ry. Co.*, L. R. 4 Q. B. 693; *Southcote v. Stanley*, 1 H. & N. 247. See *Tarry v. Ashton*, 1 Q. B. D. 314, 319, *Blackburn, J.*

⁴ *Southcote v. Stanley*, *supra*.

no gift, to be enlarged; it may even be the *duty* of the customer to enter, and not merely his convenience. A master may require his servant to go to a neighbouring shop for provisions; an officer may be required to enter upon premises to make a levy. And the right to protection should and does cover both entering and leaving the premises¹.

It is clear that the owner or occupant of the premises owes to customers the duty to keep the premises in such repair or condition as to enable them to go thereon for the transaction of their business in the usual manner of customers: and that, if injury happen by reason of the improper state of the premises, of which fact the occupant is or ought to be aware, he will be liable. Or, to put a case as stated from the bench, the owner or occupant of premises is liable in damages to those who come to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the premises or of the access thereto, which is known by him and not by them, and which he has negligently suffered to exist, and has given them no notice of². For example: The defendant, proprietor of a brewery, leaves a trap-door in a passage-way within his premises, leading to his office, open and unguarded by night, and the plaintiff's wife, in going through the passage-way by night for purposes of business with the proprietor, falls, without fault of her own, down the hole and is killed. The defendant is liable³.

In accordance with the principle stated, the proprietors of a wharf, established for the use of the public, are liable for injury sustained by a vessel by reason of the dangerous condition of the place of landing, known to the proprietors of the wharf and carelessly allowed to remain, and not known to the plaintiff. For example: The defendants, owners of a wharf at tide-water, procure the plaintiff to bring his vessel to it to be there discharged of its cargo, and suffer the vessel to be placed there, at high tide, over a rock sunk and concealed in the adjoining dock. The defendants are aware of the position of the rock and of its danger to vessels; but no notice of its existence is given, and

¹ Chapman v. Rothwell, El. B. & E. 168, *infra*.

² Carleton v. Franconia Iron Co., 99 Mass. 216, Gray, J.

³ Chapman v. Rothwell, El. B. & E. 168.

the plaintiff is ignorant of the fact. With the ebb of the tide the vessel settles down upon the rock and sustains injury. The defendants are guilty of a breach of duty and are liable for the damage¹.

The question of the occupant's liability in cases like this will be affected by the consideration whether the injured party was fairly authorized under the circumstances to go upon the particular part of the premises at which the accident happened. If the place was one which customers usually frequent without objection, it will be assumed that the party was authorized to go there. For example: The defendant, owner of a shop, situated upon a public street, let the upper stories thereof to another; and an entrance to the shop directly in front of the stairs which lead above is so constructed and kept constantly open that it is used for passage for persons going upstairs. There is a trap-door between the entrance and the stairs; and the plaintiff entering the place on business with the defendant, and in the exercise of due care, falls through the trap, the same being open, and is injured. The defendant is guilty of a breach of duty in leaving the trap-door open, and is liable to the plaintiff².

If however a customer is injured by reason of the bad condition of a portion of the premises not open to the public, and no invitation or inducement has been held out to him by the owner or occupant to go there, he cannot recover for injury sustained there, though the place be frequented by the servants of the occupant. For example: The defendants are owners of a foundry, on the front door of the outer part of which is placed the sign 'No admittance.' The plaintiff enters the outer building to inquire after certain castings of his, and the defendant tells him that they are nearly ready, and sends a workman into the foundry part of the building to see about them. The plaintiff follows the workman, though not invited, and though none but persons employed there go into the foundry, falls into a scuttle, and is injured. The defendant is not liable³.

This duty to customers however requires the occupant to use due care over all parts of his premises and their appurtenances

¹ Carleton v. Franconia Iron Co., supra; The Moorecock, 13 P. D. 157; affirmed 14 P. Div. 64.

² Elliot v. Pray, 10 Allen (Mass.), 378.

³ Zuebisch v. Tarbell, 10 Allen (Mass.), 385.

to which the customer has need of access in the performance of the business. For example: The defendants, owners of a dock, provide a gangway for passage from the plaintiff's vessel; the gangway being in an insecure position, to the knowledge of the defendants, but not to the knowledge of the plaintiff. The plaintiff is injured while properly passing over the same. The defendants are liable¹.

Workmen too on ships in dock, though not the servants of the dock owner, are deemed to be invited by him to use the dock and all appliances provided by him as incident to the use of the dock². Indeed, the owner of premises may be liable, though the business was not transacted by the plaintiff in the usual way or place, provided he could not so do it conveniently, and was not prohibited from doing it as he did; the defendant or his servant seeing him at the time. The plaintiff is not deemed a bare licensee in such a case³.

Where the injury has been sustained, not by reason of any improper condition of the defendant's premises, but by a fall down an ordinary stairway, or the like, the defendant is not guilty of negligence in leaving a door open or in failing to give notice of the place where danger lies⁴.

In regard to this class of cases, it is to be observed that, if there is no actual invitation to the injured person to go upon the

¹ *Smith v. London Docks Co.*, L. R. 3 C. P. 326.

² *Heaven v. Pender*, 11 Q. B. Div. 503, 515. A broad rule of liability in negligence cases was laid down at p. 509 by Lord Esher, broader than the other judges were willing to accept. But it was considered correct in *Thrussell v. Handyside*, 20 Q. B. D. 359, 363. The rule of Lord Esher was thus stated: 'Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.' That however would make an occupant of premises liable for passive negligence. For what *Heaven v. Pender* decides see *Cann v. Wilson*, 39 Ch. D. 39, 42. But *Cann v. Wilson* is overruled by *Le Lievre v. Gould*, 1893, 1 Q. B. 491.

³ *Holmes v. Northeastern Ry. Co.*, L. R. 4 Ex. 254; s. c. L. R. 6 Ex. 123, Exch. Ch.

⁴ *Wilkinson v. Fairrie*, 1 H. & C. 633; *Gaffney v. Brown*, 150 Mass. 479.

premises in question, in order to recover damages for injury sustained he must have gone upon the premises for business with the occupier¹. But this is not enough. A man has no right to intrude himself upon another, even for purposes of business. The business which will justify an entry upon the premises, and entitle the party to damages for injuries sustained, must, in the absence of an express invitation, or an engagement for services, be the business of the occupant, including business which he is bound to attend to². A shopkeeper is bound to use due diligence to keep his premises in fit condition for persons who go to him to buy, but not for pedlers who go to sell³; unless indeed they are persons with whom he is accustomed to deal and whom he expects to come into his shop. So likewise, under the same circumstances, he would probably be liable for harm to a creditor, or his servant, who went into his shop to demand payment of a debt due⁴, but not to a beggar.

Customers, within the meaning of the foregoing paragraphs, appear to be persons with whom one is *accustomed* to have dealings, together with such as one has or seeks any particular dealing with. Besides these there are persons who may be called quasi-customers, who, entering for the benefit of the occupant, may be considered as presumptively invited by him, and accordingly stand on the same footing as customers. This class will include postmen⁵, policemen⁶, and perhaps firemen⁷. Officers, certainly, entering by request of the occupant, on *business*, may recover for damage

¹ *Collis v. Selden*, L. R. 3. C. P. 495; *Hart v. Cole*, 156 Mass. 475, 477; *Tebbutt v. Bristol & E. Ry. Co.*, L. R. 6 Q. B. 73, 75.

² *Hart v. Cole*, ut supra.

³ Id.

⁴ See *Indermaur v. Dames*, L. R. 1 C. P. 274; L. R. 2 C. P. 318.

⁵ *Gordon v. Cummings*, 152 Mass. 513, letter-box for tenants of defendant, on defendant's premises. See ante, pp. 342, 343.

⁶ *Learoyd v. Godfrey*, 138 Mass. 315; *Parker v. Barnard*, 135 Mass. 116.

⁷ *Parker v. Barnard*, 135 Mass. at p. 119. But see cases in note 2, p. 356. There is difficulty sometimes in deciding whether a person is to be considered as standing on the footing of a customer. What, for instance, is to be said of a person travelling, by a free pass, on a railroad? See *Quimby v. Boston R. Co.*, 150 Mass. 365, and the cases therein reviewed; *Rogers v. Kennebec Steamboat Co.*, 29 Atl. Rep. 1069 (Maine); *Griswold v. New York R. Co.*, 53 Connecticut, 371.

due to the occupant's passive negligence¹. This should be equally true of persons entering under license of law, whether actually commanded to enter or not².

Another question deserves consideration, namely, of the liability of the landlord of leased premises to customers of the tenant in a case in which he would be liable to one of his own customers. The landlord may or may not owe a duty to them. He may owe the duty to such persons not to be guilty of 'active' negligence, as, for instance, where, actually knowing that his premises are in unsafe and improper condition, he invites them to enter, or sees them enter, without giving them warning. For passive negligence however it seems that the landlord would not be liable. For example: The defendant lets an unfurnished house the staircase of which is then in a dangerous condition, due to the defendant's negligence. The plaintiff enters the premises by request of and for the tenant, to move some furniture. While doing this he is hurt by reason of the defective condition of the staircase. The defendant is not liable³.

This doctrine however is distinct from the question of the liability of the landlord where the duty to repair, by contract with the tenant or in any other way, rests upon the landlord. Liability *may* fall on the landlord in such a case, even when the damage is done to a customer of the tenant. Thus the landlord will be liable when, having let a building (for instance in flats) to several, with common hallways and staircases, he has reserved or taken upon himself the care, as usually he would do, of such places—he will be liable to customers of the tenants who have sustained damage by reason of his negligence in respect of such duty⁴.

¹ Cases in note 6, p. 355.

² *Parker v. Barnard*, 135 Mass. at p. 119. But see *Gibson v. Leonard*, 32 N. E. Rep. (Illinois), 182; *Beehler v. Daniels*, 27 L. R. A. (Rhode Island), 512. There appears to be no such distinction in cases of license by law as prevails in license by the party, touching what may be called orders or ranks of license (bare licensees, invited licensees, etc.).

³ *Lane v. Cox*, 1897, 1 Q. B. 415. See *Roche v. Sawyer*, 176 Mass. 71.

⁴ *Miller v. Hancock*, 1893, 2 Q. B. 177, C. A.; *Marwedel v. Cook*, 154 Mass. 235, 236; *Plummer v. Dill*, 156 Mass. 426, 428; *Gordon v. Cummings*, 152 Mass. 515.

§ 13. MASTER AND SERVANT: 'ASSUMING THE RISK'.¹

As a servant, when upon his master's premises, is there by express invitation of the master, the master should and does owe a duty to him to exercise reasonable care, skill, and diligence in regard to the condition of the place, except in so far as the servant may have exempted his master from that duty. The exception is now the subject for consideration, and may be thus stated: The servant exempts his master from the duty in question² when he 'assumes the risk,' as the phrase is; which means, that, when the servant takes the risk freely and willingly,—as a willing man, 'volens,'—he cannot maintain an action against his master for what happens from the exposure. It is a case of consent; *volenti non fit injuria*.

The duty of the master towards his servant may now be more fully stated thus: Except in so far as the servant has assumed the risk, the master, personally and by his servants generally, must exercise reasonable care, skill, and diligence, in the following things,—to have and keep his premises in safe condition for the servant, and, according to the employment, to provide and keep constantly for him safe ways, works, machinery, tackle, appliances, and the like, and competent men, and none but competent, to carry on the service with him³. And that

¹ This whole subject has received so much attention in America that the author may be pardoned for the large citation of American decisions. But the doctrine (like the entire common law) is common, even in its details, to both and all branches of the English-speaking race.

² A moral duty on the part of the master may no doubt remain, but it is of imperfect obligation. *Yarmouth v. France*, 19 Q. B. D. 647, 657; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158, 159; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 136.

³ See *Patterson v. Wallace*, 1 Macq. 748; *Williams v. Clough*, 3 H. & N. 258; *Mellors v. Shaw*, 1 B. & S. 437; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, id. 300; *Watling v. Oastler*, L. R. 6 Ex. 73; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 586; *Texas R. Co. v. Archibald*, 170 U. S. 665 (as to cars of other railways); *Hanley v. California Bridge Co.*, 127 California, 232 (safe place for work); *Hennesey v. Bingham*, 125 California, 627 (safe place); *Channon v. Sanford Co.*, 70 Connecticut, 573 (safe place); *North Chicago R. Co. v. Dudgeon*, 184 Illinois, 477 (safe place); *Crown v. Orr*, 140 New York, 450; *Bailey v. Rome R. Co.*, 139 New York, 302; *Toy v. United States Cartridge Co.*, 159 Mass. 313; *Illick v. Flint R. Co.*,

duty cannot be delegated, so as to exempt the master¹. Prima facie the master owes it; it is for him to show, if he can, that the servant has assumed the risk, otherwise he will be liable for any damage suffered by the servant by reason of the failure of the master, or any of his other servants, in any of the particulars above named. For example: The defendants employ the plaintiff to lay bricks for them, which must be carried up over a scaffold erected for the purpose by the defendants. The materials supporting the scaffold are in unfit condition, to the knowledge of both parties. The defendants personally, or by servants in charge, direct the plaintiff to go upon the scaffold, and the plaintiff does so, but not volens; the supports give way, and the plaintiff is thrown down and seriously hurt. The defendants are liable². Again: The defendant, a maker of cartridges, sets the plaintiff, one of his servants, to work at a machine so constructed as to call for frequent replacing of one of its constituent parts; defect in such part being a defect in the machine. The defendant fails to have the part replaced on a particular occasion, when by reasonable care in inspection he might have known that replacing was needed, and have made the change; and the plaintiff, exercising due care, sustains injury by the failure. The defendant is guilty of breach of duty to the plaintiff³. Again: The defendants are proprietors of a cotton-mill, in which the plaintiff is employed by them. Part of one of the machines in the carding-room consists of a grooved pulley, over which a chain passes. To one end of the chain a weight is hung. An extra weight is hung by a raw-hide lacing to a hook fastened in the same chain. This latter weight did not come with the machine, and is not specially intended as a weight. It has been in use in aid of the machine however for two years, though not

67 Michigan, 632; *Fink v. Des Moines Ice Co.*, 84 Iowa, 321; *Consolidated Coal Co. v. Haenni*, 146 Illinois, 614; *Southwest Improvement Co. v. Andrew*, 86 Virginia, 270. On the duty to give warning see *Fox v. Kinney*, 72 Connecticut, 404.

¹ *Leonard v. Kinnare*, 174 Illinois, 532; *Railway v. Shields*, 47 Ohio St. 387; *Toy v. United States Cartridge Co.*, supra; *Fink v. Des Moines Ice Co.*, supra.

² *Roberts v. Smith*, 2 H. & N. 213, Exch. Ch.

³ See *Toy v. United States Cartridge Co.*, 159 Mass. 313, 315, language, in effect, of Morton, J. 'The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant,'—that is, so as to exempt the master. *Id.*

continually, and the machine works successfully, though not so well, without it. Because of want of reasonable care on the part of the defendants the lacing breaks, and the extra weight falls upon and injures the plaintiff while properly working at the machine. The defendants are guilty of breach of duty to the plaintiff¹.

When does the servant assume the risk, so as to exempt the master from the duty in question? The answer must be distributed under two heads: first, in regard to risks
Assuming the risk. assumed as incident to the contract of service; second, in regard to risks otherwise assumed.

In virtue of the contract of service the servant presumptively assumes the ordinary risks of the service; by which is meant the risks incident to the business, or, in other words, the risks without which it would be impracticable to carry on the business²; *presumptively*, for it is possible that a servant might stipulate that he should not take certain of these risks. But apart from actual stipulation in regard to some special risk, it is immaterial in this class of cases whether or not the servant *knew* of the risk in question; he assumes all risks incident to the business, but what these are in particular he cannot, in the nature of things, know. This is a distinctive feature of cases of the kind.

The risks which are incident to the business will cover the ordinary condition of the premises, while the work is going on, and being brought to a close, or being put in order. It is obvious that during such time the premises, especially those within which extensive industries are carried on, must be more or less in disorder; pieces of machinery, tools, tackle, and other things used in the business must be 'out of place' much of the time; elevators, shoots, and trap-doors will, sometimes, in the pressure of business, be left open and unguarded; these and other exposures of a dangerous character, according to the business, must, speaking of servants, be allowed³. The greater part of such a state of things might not be negligence at all;

¹ Rice v. King Philip Mills, 144 Mass. 229.

² Priestley v. Fowler, 3 M. & W. 1; Crown v. Orr, 140 New York, 450; De Graffe v. New York Central R. Co., 76 New York, 125; Consolidated Coal Co. v. Haenni, 146 Illinois, 614.

³ See Murphy v. American Rubber Co., 159 Mass. 266, slippery floor.

some of it, such as the leaving open and unguarded, elevators, shoots, and trap-doors, might be a breach of duty towards a stranger¹, while towards a servant of the proprietor it would not. The servant assumes the risk in regard to damage from acts or omissions for which the master would be liable to a stranger².

It is a plain inference that the risk thus assumed is the risk of negligence on the part of a fellow-servant, so far as that risk is 'ordinary'; for 'assuming the risk' as an incident to the business does not mean assuming the risk of the master's negligence, and the servant cannot complain if he has suffered by reason of his own negligence. But in point of law the servant is deemed to have assumed the extraordinary³ as well as the ordinary risks of negligence on the part of his fellow-servants where that is not also the master's negligence; no distinction *here* is drawn between the two kinds of risk. Indeed, at common law, all risks of negligence by a fellow-servant, not due to the master, are treated as 'ordinary.' It has accordingly been laid down as broad doctrine, at common law, that a servant cannot complain against his master of damage sustained by the negligence of a fellow-servant, where the master himself was not at fault⁴. For example: A switch-tender of the defendants, a railroad company, who is deemed a fellow-servant of the plaintiff, negligently leaves open one of his switches, by reason of which an engine of the defendants runs off the track and injures the plaintiff, the evidence showing that the defendants themselves are not guilty of negligence in any way. The defendants are not liable⁵.

¹ *Indermaur v. Dames*, L. R. 1 C. P. 274; s. c. L. R. 2 C. P. 318, Exch. Ch.; Bigelow's L. C. Torts, 668, a very important authority.

² *Id.* at pp. 679, 680, of Bigelow's L. C. Torts. See also *Thomas v. Quartermaine*, 18 Q. B. Div. 685.

³ See Bigelow's L. C. Torts, 679, Willes, J.

⁴ *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, *id.* 300; *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149, Ex. Ch.; *Priestley v. Fowler*, 3 M. & W. 1; *Farwell v. Boston & W. R. Co.*, 4 Metcalf (Mass.), 49; *Pittsburgh R. Co. v. Devinney*, 17 Ohio St. 197; *Northern Pacific R. Co. v. Poirier*, 167 U. S. 48 (brakeman and conductor of railroad train are fellow-servants); *Baltimore R. Co. v. Baugh*, 149 U. S. 368; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 692. This last case has been somewhat discussed on the facts in it, but its general language is not disputed.

Farwell v. Boston & W. R. Co., *supra*, a leading case.

While, however, the master is (at common law) exempted from liability in such cases,—on the ground that, because the servant has assumed the risk, the master is so far relieved of duty,—the American courts at least are not agreed in the definition of the term ‘fellow-servant.’ By many of the American courts, and it seems by the courts of England, the term is considered to include all persons who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, even though in different grades or departments of it¹. Other American courts exclude the last clause (concerning different grades or departments of the work) from the definition; the plaintiff being held entitled to recover if the injury was caused by a servant working in a higher grade or in a different department of the service², as for instance if the servant in a *higher* grade were a sort of vice-principal³.

This subject however is now much regulated by statute (Employers’ Liability Act)⁴, the general effect of which, speaking freely, is to overturn the rule that by the contract of service the servant presumptively assumes the risk of negligence on the part of his fellow-servants; though the rule still obtains that if the servant, in point of fact, voluntarily assumes a risk he exempts the master so far from his duty, and hence from liability for the consequences of the exposure. The maxim *volenti non fit injuria* still applies⁵.

More particularly, the statute enacts, in its first section, that

¹ *Farwell v. Boston R. Co.*, supra; *De Freest v. Warner*, 98 New York, 211; *Lineoski v. Susquehanna Coal Co.*, 157 Penn. St. 153; *New England R. Co. v. Conroy*, 175 U. S. 323, and *Baltimore R. Co. v. Baugh*, 149 U. S. 363, overruling *Chicago Ry. Co. v. Ross*, 112 U. S. 377.

² *Pittsburgh R. Co. v. Devinney*, 17 Ohio St. 197, 210; *Chicago Ry. Co. v. Ross*, 112 U. S. 377, now overruled by *New England R. Co. v. Conroy*, supra. The doctrine of fellow-servants (exempting the master) does not apply, it may be repeated, to cases in which the master has committed to a servant any of those duties before mentioned which rest upon the master personally.

³ As to that aspect of the case see *New England R. Co. v. Conroy*, supra; *St Louis Ry. Co. v. Touhey*, 67 Arkansas, 209; *Denver R. Co. v. Sipes*, 23 Colorado, 226; *Woodson v. Johnston*, 109 Georgia, 454; *Sievers v. Peters Box Co.*, 151 Indiana, 642.

⁴ 43 & 44 Vict. c. 42.

⁵ *O’Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 136.

where personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer¹; or (2) by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence²; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed³; or (4) by reason of the act or omission of any person in the service of the employer in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway;—the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.

The second section of the Act makes in effect the following exceptions: There is to be no action against the employer under

Exceptions. (1) *supra*, unless the defect arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition; nor under (4) *supra*, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein contained, provided that where a rule or by-law has been approved or accepted by one of her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under any Act of Parliament, it

¹ See *McGiffin v. Palmer's Shipbuilding Co.*, 10 Q. B. D. 5, as to ways; *Walsh v. Whiteley*, 21 Q. B. Div. 371, and cases cited, as to machinery and the whole clause; *Howe v. Finch*, 17 Q. B. D. 187, as to the whole clause.

² See *Kellard v. Rooke*, 21 Q. B. Div. 367.

³ *Id.*; *Millward v. Midland Ry. Co.*, 14 Q. B. D. 68.

shall not be deemed an improper or defective rule or by-law; nor in any case where the workman knew of the defect or negligence which caused the injury, and failed within reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service, unless he was aware that the employer or such superior already knew of the defect or negligence¹.

Other sections regulate the sum recoverable², subject to certain possible deductions³, the serving notice of the injury⁴, and define terms used in the Act⁵. In regard to definitions, the 'person who has superintendence intrusted to him' means one whose sole or principal duty is superintendence, and who is not ordinarily engaged in manual labour⁶; 'employer' includes a body of persons corporate or unincorporate; 'workman' means a railway servant and any person to whom a certain prior statute⁷ concerning employment applies.

Thus far of the risks which the servant is presumed to have assumed. The presumption against him arises because the risks are ordinary and incident to the business. Extraordinary risks. ordinary risks, when not of negligence by fellow-servants, stand upon a different footing; no presumption arises from entering the service that the servant undertook these⁸. Still he may have done so. He may, in point of fact, have assumed the risk of a certain unfit condition of the premises, or of the works or appliances,—that is, of the master's negligence, or, even under the Employers' Liability Act, of the negligence of a fellow-servant.

In this class of cases the servant must have *known* of the risk; but even knowledge is not enough. 'Scienti' is not equivalent to 'volenti'. For example: The

¹ See *Weblin v. Ballard*, 17 Q. B. D. 122; *Thomas v. Quartermaine*, id. 414, affirmed, 18 Q. B. Div. 685, Lord Esher diss. A workman may contract with his employer not to claim compensation under *this* Act. *Griffiths v. Dudley*, 9 Q. B. D. 357.

² § 3.

³ § 5.

⁴ § 7.

⁵ § 8.

⁶ See *Kellard v. Rooke*, 21 Q. B. Div. 367.

⁷ Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90.

⁸ *Consolidated Coal Co. v. Haenni*, 146 Illinois, 614.

⁹ *Thrussell v. Handyside*, 20 Q. B. D. 359, 364; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 692; *Yarmouth v. France*, 19 Q. B. Div. 647, 659; *Osborne v. Northwestern Ry. Co.*, 21 Q. B. D. 220.

defendants are contractors doing work above the floor where the plaintiff is by his employer directed to work, the place of the plaintiff being one of exposure by reason of the nature of the work which the defendants are doing, and the plaintiff being aware of the exposure but not incurring it voluntarily. By the defendants' negligence a piece of iron is dropped upon and injures the plaintiff. The defendants are liable, the plaintiff's knowledge not amounting to consent¹.

But if the servant, *at the time of making the contract*, knew² of the existence of a particular extraordinary danger, and also fully appreciated³ the same, his entering into the contract amounts to assuming the risk. That is, just as, by entering the service, the servant assumes the ordinary risks, and exempts his master so far from duty, so now, by entering the service knowing and appreciating the nature of an extraordinary risk, he assumes that risk, and exempts his master from duty in regard to it⁴. For example: The defendants are a gaslight company having a quantity of coal to be wheeled under sheds to a certain place, over high, narrow 'runs,' not provided with guards on the sides. The plaintiff enters into the defendants' service, to wheel coal over the runs, knowing that they are not provided with guards,

¹ Thrussell v. Handyside, *supra*, distinguishing Woodley v. Metropolitan Ry. Co., 2 Ex. Div. 384, and other cases.

² Some dicta put it thus: If the servant knew, or had the *means* of knowledge, etc. Crown v. Orr, 140 New York, 450. But the latter clause should be omitted; it is inconsistent with requiring full appreciation of the danger.

³ Ciriack v. Merchants' Woollen Co., 151 Mass. 152; Nofsinger v. Goldman, 122 California, 609. Nor does it apply where the harm was due to the combined negligence of the master and a fellow-servant. Chicago R. Co. v. Gellison, 173 Illinois, 264. If for any reason the servant did not fully appreciate the danger, as for instance from mental deficiency or from inexperience, he has not consented. Ciriack v. Merchants' Woollen Co., *supra*; Consolidated Stone Co. v. Summit, 152 Indiana, 297. As to the master's duty to a servant under age, see Alabama R. Co. v. Marcus, 115 Alabama, 389.

⁴ Crown v. Orr, 140 New York, 450; Kaare v. Troy Steel Co., 139 New York, 369; White v. Witteman Lithographic Co., 131 New York, 631; De Forest v. Jewett, 88 New York, 264; Gibson v. Erie Ry. Co., 63 New York, 449; Ragon v. Toledo R. Co., 97 Michigan, 265; s. c. 91 Michigan, 379; Illick v. Flint R. Co., 67 Michigan, 632; Batterson v. Chicago Ry. Co., 53 Michigan, 125; O'Neal v. Chicago Ry. Co., 132 Indiana, 110; Hayden v. Manuf. Co., 29 Connecticut, 548; Consolidated Coal Co. v. Haenni, 146 Illinois, 614; Kohn v. McNulta, 147 U. S. 238.

and fully appreciating the danger, and in carefully wheeling over the same falls off the side, and is injured. The plaintiff assumed the risk, and cannot recover even under the Employers' Liability Act (in regard to defective ways, works, or machinery)¹. Again: The defendants are a railroad company, having had in their employ the plaintiff's intestate. The deceased was killed by being thrown from a hand-car, which he and other servants of the defendants were propelling on the defendants' road. One handle of the walking-beam of the car was broken several weeks before, but the defendants' servants continue to use the car, using the handle of a pick or a crowbar in place of the broken part. A crowbar is being used on the day of the accident, when a train coming up behind on the same track, the servants, including the deceased, try to run the car to a distant switch, instead of removing it to another track. The men work the machinery with great force; five being engaged, two more than usual. This wrenches and breaks the lever or beam, and the plaintiff's intestate is thrown under the car and killed. The deceased had full knowledge and appreciation of the defect, and voluntarily continued in the service, without making objection. The defendants owed no duty in the matter to the plaintiff's intestate; he assumed the risk². Again: The defendant is receiver of a railroad company, in which the plaintiff's intestate had been employed as switchman and car-coupler for nearly two years in the company's freight-yard. This yard is drained by many small open ditches, running across the tracks between the ties, all of which are in plain sight, were well known to the deceased, and existed when he entered the service. While coupling cars in the yard the deceased steps into one of the ditches, falls, and is killed by the cars. The deceased assumed the risk³.

Further, the servant may have assumed the risk of extraordinary dangers arising after the contract was made, and not embraced in the contract of service at all; it is a question of

¹ *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135; *Kaare v. Troy Steel Co.*, 139 New York, 369.

² *Powers v. New York R. Co.*, 98 New York, 274. The servant should know the danger as well as the defects before he can be said to have assumed extraordinary risks. *Consolidated Coal Co. v. Haenni*, 146 Illinois, 614.

³ *De Forest v. Jewett*, 88 New York, 264. See *Gibson v. Erie Ry. Co.*, 63 New York, 449; *Kohn v. McNulta*, 147 U. S. 238.

fact whether he did. And the question, as in all other cases of extraordinary dangers, is whether he exposed himself freely, knowing and fully appreciating the danger. If he did he cannot recover against his master. For example: The defendants, proprietors of a woollen mill, send the plaintiff to a dimly lighted part of a room therein, between running gear of the machinery so placed that it might easily catch the plaintiff's clothing and pull him into the wheels. The machinery in that part of the room is in plain sight. The plaintiff has not however been employed in that part of the room; he is not warned of the danger, though warning might have been given; but he goes to the place freely, his clothing is caught in the machinery, and he is hurt. The plaintiff, if he knew and fully appreciated the danger, assumed the risk, and the defendants are not liable¹.

**Extraordi-
nary risks
arising after
the contract.**

Where the extraordinary danger was contemporaneous with the contract of service the plaintiff consents to the risk, as we have seen, if he then knew and fully appreciated the danger; his consent to the risk follows from his entering the service with knowledge and appreciation of danger². But where the extraordinary danger arises afterwards, the servant's knowledge and appreciation of it, and then incurring the *danger*, do not necessarily constitute consent, even though he did not protest, object, or complain. For example: The defendant, a boarding-house keeper, employs the plaintiff, in June, as a domestic servant. A flight of stairs leads from the kitchen of the defendant's house, on the outside of the same, to the back yard, down which the plaintiff has to go in the course of her service. The stairs are open and uncovered on the side towards the back yard, but covered overhead, except that a skylight there has, before the plaintiff's service began, lost several panes of glass. It is now March, and rain, snow, and sleet have come in and fallen upon the stairs. The steps in consequence are icy. The weather is cold, and it is snowing. It is evening; the stairway is not lighted, though the plaintiff has been over it during the day, and knows its condition and fully appreciates the danger. She

**Extraordi-
nary risks
contempora-
neous with
contract.**

¹ *Ciriack v. Merchants' Woollen Co.*, 151 Mass. 152.

² *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155; *Mahoney v. Dore*, id. 513; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135; *Cases*, 536.

attempts to go down, in the discharge of her duties as servant, taking hold of the railing, trying to go safely, and exercising due care, but slips, falls, and is hurt. It cannot be held as matter of law that the plaintiff assumed the risk; whether she did assume it or not is a question of fact, and it may be found that she did not go freely, in which case the defendant owes a duty to the plaintiff which has been broken¹.

It cannot have escaped notice that the expression 'assuming the risk' is used in the law in a technical and hence special sense. In popular speech it is common to say that one has 'taken the risk,' or 'run the risk,' when the meaning merely is that one has incurred a great danger, as where one rushes before an approaching railway train to save a child on the track². It is not ordinarily meant in such cases that the person exposing himself to danger has assumed the risk in the sense of exempting the one in control from the duty of care, as we have seen is the legal meaning of the expression³.

A final and important remark should be made. The doctrine under consideration is not a doctrine of contributory negligence.

Contributory negligence distinguished.

The servant, or indeed one not a servant, may assume the risk so as to bar any right of action by him, though he was not in the least negligent at the time⁴. Contributory negligence, which in fact often exists in these cases, makes an additional and distinct defence. The language of the authorities however sometimes fails to observe the distinction⁵.

¹ *Mahoney v. Dore*, 155 Mass. 513. See also the similar cases of *Fitzgerald v. Connecticut River Paper Co.*, id. 155, and *Osborne v. Northwestern Ry. Co.*, 21 Q. B. Div. 220.

² See *Eckert v. Long Island R. Co.*, 43 New York, 502. The rescue of a child in this case was treated on the footing of a question of negligence in the plaintiff's intestate, killed in the act, not as a question of assuming the risk. A majority of the court held that under the circumstance the deceased had not been guilty of negligence; the distinction being taken between attempts to save life and attempts to save property.

³ The rule as to trespassers and bare licensees might, it seems, be put upon the ground of assuming the risk.

⁴ *Mellor v. Merchants' Manuf. Co.*, 150 Mass. 362, 363.

⁵ Note a want of clearness on this point in *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158, 159.

§ 14. CONTRIBUTORY FAULT

Generally speaking, it is a defence to an action of tort that negligence or other wrongdoing on the part of the plaintiff

Meaning of the term : proximate and remote causes.	'contributed' to produce the damage of which he complains ¹ . The reason of this lies in the consideration that a man is not liable for damage which he has not caused ² ; or, conversely, the law holds men liable for those wrongs alone which they have caused. If the defendant did not, either personally, or by another under his express or implied authority, cause the damage, he is not liable; and it is part of the plaintiff's case to show that the defendant wholly caused the damage of which he complains ³ . Now if there intervened between the act or omission of the defendant and the damage sustained an independent act or perhaps omission whether of negligence or other wrongdoing, which, in the sense of a cause, contributed to effect the damage, it follows that the misfortune might not have happened but for that act or omission; and hence the plaintiff cannot prove that the defendant wholly caused the harm ⁴ .
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But an act or an omission may be said to 'contribute' to a result as well when it does not stand in the relation of a cause to that result as when it does; and the term 'contribute' or 'contributory' is in fact sometimes used of situations in which there is no connection of cause and effect recognized by law, that is, in cases in which the contributory act or omission is not

¹ *Murphy v. Deane*, 101 Mass. 455. So by the Roman law. 'Quod quis ex culpa sua damnum sentit non intellegitur damnum sentire.' Dig. 50, 17, 203. Modern writers on the Roman law call this 'culpa-compensation'; 'the culpa on one side compensates for the culpa on the other.' Grueber, *Lex Aquilia*, pp. 31, 228. In some of the American States the plaintiff in a suit for negligence has to prove that he was not guilty of contributory fault. *Murphy v. Deane*, supra; *McLane v. Perkins*, 92 Maine, 39; *Getman v. Delaware R. Co.*, 162 New York, 21.

² The word 'cause' when here used alone = 'proximate cause.'

³ *Murphy v. Deane*, supra. The liability of a master for the (in fact) unauthorized torts of his servants, or of a principal for the like torts of his agent, stands on special grounds. Ante, p. 35.

⁴ 'The reason for admitting culpa-compensation [in Roman law] is certainly that the causal connection between act and damage is interrupted by the culpa of the injured party.' Grueber, *Lex Aquilia*, p. 228; id. p. 31.

'causa proxima' as it must be to have any legal consequences, but is only 'causa remota.' 'Causa proxima, non remota, spectatur.' When the term in question is used in this broader sense, it will then be necessary to understand that only such contributory act or omission as may be considered a proximate cause¹ of the misfortune complained of can bar the action. But the stricter use of the term as *causa proxima* is the more common and better use. In some cases the situation may be such that the plaintiff cannot recover even when the defendant's fault was adequate to produce the injury without the plaintiff's negligence, as in certain cases of collision where the fault on each side is contemporaneous². But in no case can the plaintiff recover where the evidence falls *short* of showing that the defendant's act or omission proximately caused the injury.

On the other hand, conditions (remote causes) must not be confounded with proximate causes³. The mere fact that a person or his property is in an improper position, **Conditions distinguished.** when, if he had not been there, no damage would have been done to him, does not preclude him from recovering⁴. Such circumstance is only a condition to the happening of the damage, not a cause of it⁵. The misfortune may have been a very unnatural and extraordinary result of the situation, not to be foreseen in the light of ordinary events; and when that is the case the fact that the person or property was in the particular situation is not in contemplation of law a cause of the damage. A man may in the daytime fall asleep in the country highway, or leave his goods there, and recover for injury by another's driving carelessly over him or them; since, though the position occupied is a condition to the damage, the damage is not the natural result of the act⁶.

The law therefore considers whether the conduct of the plaintiff had a natural tendency, such as exists between cause

¹ Not necessarily as the only one.

² *Murphy v. Deane*, 101 Mass. 455, 464, 465; *Brember v. Jones*, 67 New Hampshire, 374.

³ *Newcomb v. Boston Protective Dept.*, 146 Mass. 596.

⁴ *Id.*

⁵ *Id.*

⁶ See the remarks of Parke, B., in *Davies v. Mann*, 10 M. & W. 546, 549.

and effect, to place the party or his property in the direct way of the danger which resulted in the disaster. If it had not, it did not, in the sense of a cause, contribute to the injury. Such is the legal theory of contributory negligence or other fault as a bar to an action for tort. For example: The defendant sails a vessel in such a careless manner as to cause a collision with another vessel on which the plaintiff is a passenger; the plaintiff at the time standing in an improper place for passengers, to wit, near the anchor, which is struck by the defendant's boat and caused to fall upon the plaintiff's leg, breaking it. The defendant is liable; the plaintiff's standing in the improper position not contributing, in the stricter sense, to the injury, since it would not be the natural and probable result that one standing there would be hurt by a collision¹. Again: The defendant driving carelessly along the highway runs against and injures the plaintiff's donkey, straying improperly therein, and fettered in his forefeet so as not to be able to move with freedom. This is a breach of duty to the plaintiff; the latter's act not contributing, in the same sense, to the damage². Again: The plaintiff's vehicle, improperly placed in the highway, is run into negligently by the defendant's team. The plaintiff is not disentitled to recover because of the position of his vehicle³.

In accordance with the same principle, a traveller may be riding a horse or in a carriage which he had no right to take or use, or on a turnpike without payment of toll, or with a speed forbidden by law, or upon the wrong side of the road⁴; or his horses may be standing in the street of a town, without his attending by them and keeping them under his command as the law requires; in none of these cases is his right of action for any injury he may sustain by the negligent conduct of another affected by these circumstances. He is none the less entitled to recover, unless it appear that his own negligence or other wrongdoing contributed as a proximate cause to the damage⁵.

¹ *Greenland v. Chaplin*, 5 Ex. 243. Or, as Pollock, C. B., suggested, the plaintiff could not have foreseen the consequences of standing where he did; that is, such consequences were unusual, not the common effect of such an act.

² *Davies v. Mann*, 10 M. & W. 546.

³ *Newcomb v. Boston Protective Dept.*, 146 Mass. 596.

⁴ *Brember v. Jones*, 67 New Hampshire, 374.

⁵ *Norris v. Litchfield*, 35 New Hampshire, 271, Bell, J.

This is equally true though the plaintiff is a positive trespasser, as the examples elsewhere given of men injured by savage dogs or spring-guns while trespassing by day upon the defendant's premises clearly show¹; for it is not the natural or usual effect of trespassing in the daytime (not feloniously) that the party should be bitten by a savage dog not known to be there, or maimed by the discharge of a hidden gun². Wrongful acts or omissions cannot be set off against each other, so as to make the one excuse the other, unless they stand respectively in the situation of true causes to the damage.

In this connection attention may be called to certain American cases of injury sustained on Sunday through the defendant's **Violating** negligence by a plaintiff engaged in acts neither **Sunday laws.** of necessity nor of charity; in other words, in acts rendered unlawful by statute. By most of the courts it is held that the plaintiff is not thereby precluded from recovering for damage sustained, in the absence of explicit language to that effect in the statute; and this on the ground that the mere doing of the illegal act is not, or may not be, contributory in the proper sense to the damage sustained³. For example: The defendant, a town, bound to keep a certain bridge in repair, negligently allows it to get out of order; and the plaintiff, without notice of the condition of the bridge, in attempting to drive cattle over it to market on Sunday breaks through the bridge, several of his cattle being killed and others hurt thereby. The defendant is guilty of a breach of duty to the plaintiff, and liable to him for the damage sustained; the violation of the Sunday law not properly contributing to the result, since it is not the natural or usual result of travelling on Sunday that damage should follow⁴.

This is clearly correct in principle, in the absence of language of the statute plainly intended to prohibit all actions for damage

¹ *Bird v. Holbrook*, 4 Bing. 628; *Loomis v. Terry*, 17 Wendell (New York), 496; ante, pp. 344, 345, note.

² Contra, if the animal should hurt a person who is irritating it.

³ *Sutton v. Wauwatosa*, 29 Wisconsin, 21; *Mohney v. Cook*, 26 Penn. St. 342; *Corey v. Bath*, 35 New Hampshire, 530; *Carrol v. Staten Island R. Co.*, 58 New York, 126.

⁴ *Sutton v. Wauwatosa*, supra.

sustained on Sunday, except such as is caused without any violation of law by the injured party; but the contrary rule prevails, or has prevailed, in some of the States¹. This contrary rule however is considerably narrowed by the courts which adhere to it. It is considered not to apply to cases in which the defendant has misused property of the plaintiff hired on Sunday². So too it is held that one who is walking on the highway on Sunday, simply for exercise or fresh air, may recover against a town for negligence whereby he has sustained damage³.

It will however be difficult sometimes to determine whether the fact or facts in question amount to a legal cause or only to a condition of the misfortune; and the courts may, for that very reason, be disposed to cut the matter short by laying down a positive rule of law covering the question⁴. Thus in the American Federal courts, and in some of the State courts, contrary to the rule in others, the law requires one to 'look and listen' before crossing a steam or an electric railway or a highway; failure to do so is accordingly *prima facie* evidence of contributory negligence, barring an action⁵. But such cases are not to be taken as invalidating the general theory of contributory negligence.

¹ *Bosworth v. Swansea*, 10 Metcalf (Mass.), 363; *Jones v. Andover*, 10 Allen (Mass.), 18; *Connolly v. Boston*, 117 Mass. 64. See however *Newcomb v. Boston Protective Dept.*, 146 Mass. 596, which in principle is opposed to these cases. The law of Massachusetts has been changed by statute recently.

² *Hall v. Corcoran*, 107 Mass. 251, overruling *Gregg v. Wyman*, 4 Cushing, 322, on authority of which *Wheldon v. Chappel*, 8 Rhode Island, 230, was decided. See also *Woodman v. Hubbard*, 25 New Hampshire, 67; *Morton v. Gloster*, 46 Maine, 520.

³ *Hamilton v. Boston*, 14 Allen (Mass.), 475. See further *Cox v. Cook*, *id.* 165; *Feital v. Middlesex R. Co.*, 109 Mass. 398.

⁴ See *ante*, p. 312, and notes.

⁵ *Railroad Co. v. Houston*, 95 U. S. 697; *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379; *Baker v. Kansas City R. Co.*, 147 Missouri, 140; *Connolly v. New York R. Co.*, 158 Mass. 8; *Cole v. New York R. Co.*, 174 Mass. 537; *Robbins v. Springfield Street Ry. Co.*, 165 Mass. 30 (drawing a distinction between steam and electric or horse railways); *Creamer v. West End Street Ry.*, 156 Mass. 320 (the same distinction); *Cawley v. La Crosse Ry. Co.*, 101 Wisconsin, 145 (applying the rule to electric railways), and cases cited; maintaining the 'look and listen' rule. *Contra*, *Judson v. Central Vermont R. Co.*, 158 New York, 597; *Lawler v. Hartford Street Ry. Co.*, 72 Connecticut, 74; *Atlantic City R. Co. v. Goodin*, 45 L. R. A. 671 (New Jersey), and cases cited. Compare *Herbert v. Southern Pacific R. Co.*, 121 California, 227; *Niosi v. Empire Laundry*, 117 California, 257 (crossing highway); *Chicago Ry. Co. v.*

It is laid down by the authorities that, if the plaintiff could have avoided the disaster by the exercise of 'due care,' he is not entitled to complain of the negligence of the defendant¹. This is not intended however to suggest a general test of liability. In the case of the fettered donkey above stated the plaintiff might have avoided the effect of the defendant's negligence by keeping his animal at home, but he was still held entitled to recover. The meaning of the rule in question is that in the moment of actual peril the plaintiff, if at hand, must not be guilty of failing to exercise such reasonable care under the circumstances as he can, to protect himself against damage. Being at hand at the moment, the plaintiff might be able to prevent harm, and must govern himself accordingly.

One who however in a sudden emergency loses presence of mind through the misconduct of the defendant, and while in such loss, and owing to it, falls into danger and is hurt, is not thereby guilty of want of due care or of contributory negligence. The defendant's unlawful act has caused the loss of presence of mind, and what happens afterwards is but the natural effect of the act². For example: The defendant is carelessly driving an express waggon along the side-walk of the street of a city, at a rapid rate, which suddenly comes up behind the plaintiff, when she instinctively springs aside to escape danger, and in so doing strikes her head against the wall of a building, and is hurt. The defendant is liable³. Again: The defendant, a railway company, negligently leaves

Lowell, 151 U. S. 209. And see *Chicago R. Co. v. Pearson*, 184 Illinois, 386; *Harvard Law Rev.*, Nov. 1899, p. 226. The cases affirming the rule require one to look and listen, or to show a sufficient reason for not doing so in case of omission. *Baker v. Kansas City R. Co.*, *supra*. The cases contra leave it to the jury to determine, on the facts, without any presumption, whether the plaintiff was guilty of contributory negligence or not.

¹ *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546; *Tuff v. Warman*, 5 C. B. N. S. 573, Exch. Ch.; *Caswell v. Worth*, 5 El. & B. 849; *Haley v. Case*, 142 Mass. 316, 321; *Ferren v. Old Colony R. Co.*, 143 Mass. 197; *Ciriack v. Merchants' Woollen Co.*, 151 Mass. 152; s. c. 146 Mass. 182.

² *Coulter v. American Express Co.*, 56 New York, 585; *Getman v. Delaware R. Co.*, 162 New York, 21. See also *Johnson v. West Chester Ry. Co.*, 70 Penn. St. 357; *Galena R. Co. v. Yarwood*, 17 Illinois, 509. Compare *The Bywell Castle*, 4 P. Div. 219. But see *Meyer v. Boepple Co.*, 83 N. W. Rep. 809 (Iowa).

³ *Coulter v. American Express Co.*, *supra*.

the gates of a level-crossing open, and the plaintiff is thereby misled into crossing, supposing it to be safe to cross, but not using his faculties as well as he might have done under other circumstances; and he is hurt by a passing train. The defendant is liable¹.

On the other hand, it is also laid down by the authorities that the plaintiff may be entitled to recover, if the *defendant* might, by the exercise of 'due care' on his part, have avoided the consequences of the negligence of the plaintiff². This too cannot be intended to suggest a general test of liability. In the case of one who in the want of due care has fallen through a trap-door left open by the defendant negligently, the defendant clearly might have avoided the consequence of the plaintiff's negligence by having closed the door; and yet he is not liable. The meaning of the rule is that where the plaintiff was not at hand, so as to prevent the damage, the defendant will be liable if by due care he might have prevented the harm and did not exercise it. The question would be proper in a case like that of the fettered donkey³. Again: The defendant is pilot of a steamer on the Thames, which runs down the plaintiff's barge. There is no look-out on the barge, but there is evidence that the steamer might easily have cleared her. It is proper to leave it to the jury to say whether the want of a look-out is negligence in the plaintiff, and if so, whether it directly contributed to the damage done; the negligence of the plaintiff, if found, not barring his action if the defendant might have avoided the consequences of it by the exercise of due care⁴. If the rule referred to were applied to cases of simultaneous negligence, at the moment of disaster, either party to a collision

¹ *Northeastern Ry. Co. v. Wanless*, L. R. 7 H. L. 12. See *Sweeny v. Old Colony R. Co.*, 10 Allen (Mass.), 368; *Davey v. Southwestern Ry. Co.*, 12 Q. B. Div. 70; *Dublin & Wicklow Ry. Co. v. Slattery*, 3 App. Cas. 1155.

² *Tuff v. Warman*, 5 C. B. N. S. 573, Exch. Ch., leading case.

³ See also *Radley v. London & Northwestern Ry. Co.*, 1 App. Cas. 754, reversing L. R. 10 Ex. 100, and restoring L. R. 9 Ex. 71, a very instructive case. See especially the pointed statement on p. 760, by Lord Penzance. It is there laid down that if the defendant 'might at this stage of the matter [the actual emergency] by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.'

⁴ *Tuff v. Warman*, 5 C. B. N. S. 573.

caused by their joint carelessness might be entitled to recover against the other; while, in truth, neither can recover¹.

§ 15. COMPARATIVE NEGLIGENCE

In some of the American States, it may be noticed in passing, a doctrine of 'comparative negligence' takes the place of the **Doctrine** doctrine of contributory negligence. It has been **stated.** stated from the bench as follows: Where there has been negligence in both plaintiff and defendant, still the plaintiff may recover if his negligence was slight, and that of the defendant gross in comparison. And this rule has been extended to cases in which the negligence of the plaintiff has contributed, in some degree, to the injury complained of². The defendant's negligence however must stand as a cause towards the injury³. Accordingly it was laid down, of death caused at a railroad crossing, that if the deceased was guilty of negligence in not observing the precautions which an ordinarily prudent man would observe before attempting to cross the track, then the real question was, whether his negligence in that respect was slight in comparison with that of the defendants, if they were guilty of negligence at all⁴.

§ 16. INTERVENING FORCES

Thus far of the contributory acts or omissions of the plaintiff. But it may be that between the wrongful act of the defendant **Unforeseen** and the damage sustained by the plaintiff there **forces.** intervened an act or agency of a third person, in no way probable and not in fact anticipated⁵, which directly produced the damage. If this be the case, and the misfortune would not have followed without it, the defendant, similarly it

¹ *Murphy v. Deane*, 101 Mass. 455, 464, 465. Some of the language in *Tuff v. Warman*, *supra*, is here criticized, but not so as to affect the example of the text.

² *Chicago & Q. R. Co. v. Van Patten*, 64 Illinois, 510, 517, Scott, J.

³ *Id.* at p. 514.

⁴ *Id.* p. 517. Compare the rule in *Admiralty*.

⁵ See *Clark v. Chambers*, 3 Q. B. Div. 327, as to damage resulting from removal by a third person of obstructions unlawfully put in the highway by the defendant, he being held liable.

seems, will not be liable. For example: The defendant wrongfully sells gunpowder to the plaintiff, a boy eight years old, who takes it home and puts it into a cupboard, where it lies for more than a week, with the knowledge of the child's parents. The boy's mother now gives some of the powder to him, which he fires off with her knowledge. This is done a second time, when the child is injured by the explosion. The defendant is not liable¹.

Indeed the defendant can never be liable when anything out of the natural and usual course of events unexpectedly arises and operates in such a way as to make the defendant's negligence, otherwise harmless, productive of injury. A whirlwind does not usually arise on a quiet day, and hence, though a person should build a small fire in a country road, contrary to law, on a mild day, he would not (probably) be liable for the consequences of a whirlwind suddenly springing up and scattering the fire, to the damage of another².

The case will be different if the party acted with knowledge or notice of the intervening act, agency, or force of nature. In this case he will be liable³. For example: The defendant shoots a pistol against a polished surface in a thoroughfare, at such an angle as to render it likely that the ball will glance and hit some one. It does glance and hits the plaintiff. The defendant has caused the injury and is liable⁴. Again: The defendant throws a lighted squib into a market-house on a fair-day, which strikes the booth of A, who instinc-

Notice.

¹ *Carter v. Towne*, 103 Mass. 507.

² Compare *Insurance Co. v. Tweed*, 7 Wallace (Supreme Court U. S.), 44, and the Roman law. *Lex Aquilia*, fr. 30, § 3, the last sentence of which runs, 'at si omnia quae oportuit observavit, vel subita vis venti longius ignem produxit, caret culpa.' For all that happens in the regular course of things, under the conditions as they exist at the time of the act or omission in question, the defendant will be liable, though the particular harm resulting may have been altogether improbable. See the important case of *Smith v. Southwestern Ry. Co.*, L. R. 5 C. P. 98, and 6 C. P. 14, Exch. Ch.; ante, pp. 42, 43. See also *Lex Aquilia*, ut supra.

³ *McDowall v. Great Western Ry. Co.*, 1902, 1 K. B. 618 (trespassing known to be frequent, and at any time likely judging from what was going on openly from day to day); *Scott v. Shepherd*, 3 Wils. 403; *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338; and other cases infra.

⁴ This example is fairly borne out by *Scott v. Shepherd*, 3 Wils. 403. Contrast *Stanley v. Powell*, 1891, 1 Q. B. 86.

tively throws it out, when it strikes the booth of *B*. The latter casts it out in the same manner, and it now strikes the plaintiff in the face, injuring him. The defendant is liable¹. Again: The defendant wrongfully sells a mischievous hair-wash to the plaintiff's husband, knowing that it is intended for the plaintiff's use, and the plaintiff is injured in using it. The defendant is liable². Again: The defendant, a manufacturer of drugs, negligently labels a jar, put up by him, of belladonna as dandelion, the former a poisonous, the latter a harmless drug. The jar passes from the defendant to a wholesale dealer, then to a retail dealer, and a portion of it then to the plaintiff, who buys and takes it as dandelion. The defendant is liable; the intermediate parties have only carried out, in the sale, the intention of the defendant³.

In cases however where the alleged breach of duty is directly involved in a breach of contract, the courts qualifiedly deny the liability of the defendant to any one except to the party with whom he made the contract,—a point elsewhere noticed⁴. The authorities are not altogether consistent, but there appears to be an agreement in regard to cases of intended harm. The general result may be stated to be, that if the defendant intended or if he can fairly be assumed to have intended the acts of the intermediate agency, as where he expects them,—for instance by making a railway carriage, to be used by passengers of the railway company for which it is made⁵,—he will be liable, though his act was a breach of contract with another⁶. The fact of the existence of a duty to the person with

Breach of contract.

¹ *Scott v. Shepherd*, 3 Wils. 403.

² *George v. Skivington*, L. R. 5 Ex. 1. See *Cann v. Willson*, 39 Ch. D. 39, 43; *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338 (misrepresentation).

³ *Thomas v. Winchester*, 6 New York, 397. The reason given by the court however was that the defendant, being engaged in a very dangerous business, acted at his own peril. Compare *Farrant v. Barnes*, 11 C. B. n. s. 553, and *Brass v. Maitland*, 6 El. & B. 470. See also *Davidson v. Nichols*, 11 Allen (Mass.), 514. The subject is well discussed in 2 Law Quarterly Review, 63–65; Pollock, Torts, 486 et seq., 6th ed.

⁴ Ante, p. 181. See Bigelow's L. C. Torts, 617–619.

⁵ *Pennsylvania R. Co. v. Snyder*, 50 Ohio St. 342; *Harvard Law Review*, April, 1902, p. 667.

⁶ See *Langridge v. Levy*, 2 Mees. & W. 519; s. c. 4 Mees. & W. 338; also *Collis v. Selden*, L. R. 3 C. P. 495, and *George v. Skivington*, above cited.

whom he contracted is not inconsistent with the existence of another duty respecting the same thing. The duty to forbear to do intentionally a thing obviously harmful preceded the formation of the contract; and it is difficult to see how that duty, owed to all persons, could, by a contract made with one or several, be abrogated in regard to others¹.

The difficulty is with cases short of intention, that is, with cases of negligence only. It has been supposed that if, by the negligence of *A*, a contract is broken between *B* and *C*, the injured party cannot maintain any action against *A*; it being declared that no duty is infringed or exists except that created by the contract. For example: The defendant, a railway company, contracts with the plaintiff's servant to carry him safely to a certain place, but negligently injures him on the way. This is no breach of duty to the plaintiff².

There is grave doubt however both in principle and upon authority, whether, apart from particular cases like the one just referred to, the rule itself upon which the decision is founded can be supported³. A railroad company or other person would not probably be liable to a master for an injury wrongfully done to a servant, without notice of the relation of master and servant⁴. But if there is a duty to refrain from intentional wrong, it is not easy to see why there cannot be a duty to refrain from negligence, where that is attended with notice of the contract, that is, of the rights of the plaintiff. The essential elements of legal duty are present in such a case; the rights of the plaintiff being known, danger is observed; hence the duty not to be guilty of misconduct touching such rights⁵.

Further see *Heaven v. Pender*, 11 Q. B. Div. 503, at p. 516. Contra, *Winterbottom v. Wright*, 10 M. & W. 109; *Longmeid v. Holliday*, 6 Ex. 761. It may well be doubted if these cases are good law. But the doctrine of *Winterbottom v. Wright* has lately been followed in an American case. *McCaffrey v. Mossberg Manuf. Co.*, 50 Atl. Rep. (Rhode Island), 651. That case however does not well represent the later American view.

¹ See *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387, 390; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 340.

² *Fairmount Ry. Co. v. Stutler*, 54 Penn. St. 375; *Alton v. Midland Ry. Co.*, 19 C. B. N. S. 213.

³ See *Taylor v. Manchester Ry. Co.*, 1895, 1 Q. B. 134, 140; *id.* 944; *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387.

⁴ Compare such cases as *Blake v. Lanyon*, 6 T. R. 221.

⁵ Ante, p. 12.

As a question of authority, there are cases of negligence entitled to great weight which are quite inconsistent with the view that the contract creates the only duty that exists in such situations. For example: The defendant, a railway company, contracts with the plaintiff's master, with whom the plaintiff is to travel in the defendant's coaches, to carry the plaintiff's luggage to a certain place, which the defendant, through negligence, fails to do. This is a breach of duty to the plaintiff¹. Again: The defendant, a railway company, receives the plaintiff into one of its coaches, on a ticket bought from another railway company, with which the defendant shares the profits of traffic. The steps of the defendant's coaches are too high for persons to alight easily at the station, which is owned by the other company; and in alighting with due care the plaintiff is hurt. The defendant is liable, without regard to the question whether the plaintiff had contracted with the other company².

If the duty resting upon the defendant be that of common carrier of passengers, or of goods, the carrier or bailor will be liable for the damage produced by a breach of his contract, due to his own negligence, even though the negligence of a third person should contribute to the damage sustained; for the party was bound to exercise due care and has not done so³. For example: The defendants, a railroad company, contract to carry the plaintiff to *W*, but on the way the train carrying the plaintiff is brought into collision with the train of another railroad company, at a crossing, through the negligence of the managers of both roads, and the plaintiff suffers injury thereby. The defendants have violated their duty to the plaintiff, and are liable for the damage sustained by him⁴.

The same doctrine would indeed apply to cases arising under any ordinary absolute contract for the performance of a specific

¹ *Marshall v. York & Newcastle R. Co.*, 11 C. B. 655; *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442. The first of these cases was before *Alton v. Midland Ry. Co.*, *supra*, but the second was afterwards, and in it *Marshall's* case was cited with approval by *Blackburn, J.* See also *Foulkes v. Metropolitan Ry. Co.*, 5 C. P. Div. 157; *Ames v. Union R. Co.*, 117 Mass. 541; and cases like *Henley v. Lyme Regis*, 5 Bing. 91, and 1 Bing. n. c. 222, *ante*, p. 331.

² *Foulkes v. Metropolitan Ry. Co.*, *supra*.

³ Compare *Burrows v. March Gas Co.*, L. R. 7 Ex. 96, Ex. Ch.

⁴ *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.), 500.

duty. For example: The defendants contract to supply the plaintiffs with proper gas-pipe. Gas escapes in a certain room from a defect in the pipe provided, a third person negligently enters the room with a lighted candle, and an explosion takes place. The defendants are liable for the loss thereby caused¹.

The rule formerly prevailed that a passenger in a stage or railway coach, or other vehicle, became by the act of obtaining passage 'identified' in law with the driver or manager of the vehicle. The effect of this doctrine was, that in an action by the passenger against a third person for negligence, whereby the former suffered damage in the course of the ride or journey, negligence on the part of the driver or manager of the vehicle in which the plaintiff has taken passage, contributing to the misfortune, was the negligence of the plaintiff. The plaintiff therefore was not entitled to recover, though he might himself have been free from fault². This doctrine still obtains in some American courts³. For example: The defendant, owner of a stage-coach, by her driver's negligence runs over and kills the plaintiff's intestate, while he is alighting from another stage-coach; which latter coach, by the negligence of the driver, has stopped at an improper place for alighting. The latter's negligence is properly contributory, but the deceased was not personally at fault. The defendant is deemed not liable⁴.

The doctrine has been much criticized and often denied by the courts⁵; and in the form above presented it has recently been overruled⁶. It was hard to understand how the plaintiff

¹ *Burrows v. March Gas Co.*, L. R. 7 Ex. 96, Ex. Ch.

² *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire Ry. Co.*, L. R. 10 Ex. 47; *Cleveland R. Co. v. Terry*, 8 Ohio St. 570; *Puterbaugh v. Reasor*, 9 Ohio St. 484; *Lockhart v. Lichtenthaler*, 46 Penn. St. 151; *Smith v. Smith*, 2 Pickering (Mass.), 621.

³ See cases in note 2, *supra*.

⁴ *Thorogood v. Bryan*, *supra*.

⁵ *The Milan*, Lush. 388; *Brown v. McGregor*, Hay (Scotl.), 10; *Little v. Hackett*, 116 U. S. 366; *Chapman v. New Haven R. Co.*, 19 New York, 341; *Coleman v. New York & N. H. R. Co.*, 20 New York, 492; *Webster v. Hudson River R. Co.*, 38 New York, 260; *Danville Turnp. Co. v. Stewart*, 2 Metcalf (Kentucky), 119.

⁶ *Donovan v. Laing Syndicate*, 1893, 1 Q. B. 629, 634, Bowen, L. J.; *The Bernina*, 12 P. Div. 58, affirmed, nom. *Mills v. Armstrong*, 13 App. Cas. 1.

could be considered identified with the driver of the carriage when the driver was wholly under the control of another. The driver could not be the passenger's servant in any accurate sense in such a case; the essential feature of the relation of master and servant was wanting, to wit, authority over the supposed servant¹. And for the same reason, the driver could not be considered as the passenger's agent. The passenger could not contract directly with the driver in the first instance, or require him, to go or to stay; nor could he compel him to stop by the way, or direct him to take a particular road, or how to drive, or how to pass a coach or an obstruction². Instead of an identification between passenger and driver, the driver himself would be liable, with the other wrongdoer, to the passenger³.

If however the passenger were himself in fault, as by participating in the negligent conduct of the driver, it is clear that he could not recover; supposing the negligence to have contributed to the misfortune. In such a case as this he might perhaps be said, in a loose way of expressing it, to have 'identified' himself with the driver.

Upon views not unlike those in regard to the supposed 'identification' of passenger and carrier, the negligence of the parent or guardian or other person in charge of a young child, in allowing the child to fall into danger, has sometimes been deemed 'imputable' to the child, so as to affect the child with contributory negligence in all cases in which the parent or guardian would in the same situation be barred of a right of action⁴. For example: The defendants, a railroad company, by the negligence of their servants in the course of their employment and the contributory negligence of

¹ *Donovan v. Laing Syndicate*, 1893, 1 Q. B. 629, 634.

² Identification, in any such sense as making the driver or manager of the vehicle the servant or agent of the passenger, had been already repudiated by Pollock, B., in *Armstrong v. Lancashire R. Co.*, L. R. 10 Ex. 47, 52.

³ See *The Bernina*, *supra*.

⁴ See *Mangan v. Atterton*, L. R. 1 Ex. 239; *Clark v. Chambers*, 3 Q. B. Div. 327; *Waite v. Northeastern Ry. Co.*, El. B. & E. 719; *Hughes v. Macfie*, 2 H. & C. 744; *Wright v. Malden R. Co.*, 4 Allen (Mass.), 283; *Holly v. Boston Gas Co.*, 8 Gray (Mass.), 123; *Callahan v. Bean*, 9 Allen (Mass.), 401. The doctrine would, so far as it may be sound, be equally applicable of course to the case of any helpless or imbecile person.

a person in charge of the plaintiff, a child too young to take care of himself, injure the plaintiff. They are deemed not liable for the misfortune¹.

This doctrine has not been accepted by all the courts; it has often been met by the same answer that has been given to the doctrine of imputing to passengers the negligence of their carriers. The negligence of a parent or custodian of a child, it is said, cannot properly be imputed to the child; and, supposing the child incapable of negligence, the conclusion is reached that he can recover for injuries sustained by the negligence of another, though the negligence of the child's parent or guardian contributed to the misfortune².

It is clear that if the child himself be guilty of contributory negligence (supposing him capable of negligence), apart from the negligence of his parent or guardian, there can be no recovery; and whether the child be capable of personal negligence is a question of fact, depending upon his age and ability to take proper care of himself³. It has sometimes been said that the same discretion is necessary in a child that is required of an adult⁴. This however could only be true, it should seem, in those cases in which the child is sufficiently mature to be able to take good care of himself⁵. In other cases, the better rule is that, so far as the question of the *child's* negligence is concerned, it is only necessary that he should exercise such care as he reasonably can, or as children of the same capacity generally exercise⁶.

In the case of a child too young to take care of himself, it is held that, if the negligence of the parent or person in charge is the sole proximate cause of the misfortune, the defendant cannot be liable. For example: The defendant, a railway company, is negligent in moving a train along one of its tracks. The

¹ *Wright v. Malden Ry. Co.*, 4 Allen (Mass.), 283.

² *Evansville v. Senhenn*, 151 Indiana, 42; *Bellefontaine R. Co. v. Snyder*, 18 Ohio St. 399; *North Penn. R. Co. v. Mahoney*, 57 Penn. St. 187; *Louisville Canal Co. v. Murphy*, 9 Bush (Kentucky), 522.

³ *Lynch v. Nurdin*, 1 Q. B. 29; *Lynch v. Smith*, 104 Mass. 52; *Evanisch v. G. Ry. Co.*, 57 Texas, 126; *Costello v. Third Avenue R. Co.*, 161 New York, 317.

⁴ *Burke v. Broadway R. Co.*, 49 Barbour (New York), 529.

⁵ See *Western R. Co. v. Rogers*, 104 Georgia, 224.

⁶ *Lynch v. Smith*, *supra*; *Western R. Co. v. Rogers*, *supra*; *Costello v. Third Avenue R. Co.*, *supra*.

plaintiff's grandmother, who has bought of the defendant a ticket of passage for herself and the plaintiff, a child, negligently attempts to cross the track in charge of the child, and the child is injured by the train. The defendant is deemed not liable; the defendant having the right to expect that the lady would take due care of herself and of the plaintiff¹.

It is however clear that if the fault of the person in charge of the child was not a proximate cause of the misfortune, the defendant, being negligent, will be liable². The parent or other person in charge could recover for an injury done to himself by the defendant's negligence; and *a fortiori* should a young child, incapable of negligence, be entitled to recover in such a case. And the same would be true of negligence on the part of the child (supposing him capable of negligence) when such fault did not contribute as a proximate cause to the injury. For example: The defendant, a hackman, carelessly runs over a child five years of age, in a city, while the child is crossing a street alone, on his way home from school. The child is not guilty of any negligence further than may be implied from his going alone; in regard to this the child's parent may be negligent. The defendant is liable; the negligence of the child, if there was any in his going alone, and of the parent, if found to exist, not contributing in the stricter sense to the misfortune, since it is not the natural and usual effect of a child's crossing the street that he should be run over³.

Indeed it is not clear that the rule should not be that a child of tender years, that is to say, incapable of negligence, should be able to maintain an action for the injury he has sustained in cases of this kind, though the person in charge

¹ *Waite v. Northeastern Ry. Co.*, El. B. & E. 719, approved in *The Bernina*, supra, by Lord Esher, 12 P. Div. at pp. 71-75. See 13 App. Cas. 10, 16, 19. This assumes that the defendant's negligence was not also a proximate cause of the injury, as it might be, as where the person in charge of the child, and the defendant, were driving negligently and came into collision. A curious parallel case is found in the Roman law. *Lex Aquilia*, fr. 11, pr.; Dig. 9, 2, 11 pr. In a game of ball a player threw the ball too hard, so that it hit the hand of a barber while shaving a slave, causing the barber to cut the slave's throat; but the barber ought not to have been where he was, and so the master was without remedy against the player. But the barber was liable, unless the slave was guilty of contributory negligence. See Grueber, *Lex Aquilia*, pp. 32, 33, 229.

² *Ihl v. Forty-second St. R. Co.*, 47 New York, 317, 323.

³ *Lynch v. Smith*, 104 Mass. 52.

was guilty of contributory negligence. It might be considered enough that the defendant's act or omission was (though not the sole) a proximate cause of the damage. And the principle of the recent decisions above referred to in regard to passenger and carrier appears to sustain the view that if the negligence of each of the persons concerned is, as it might well be, a proximate cause of the injury to the plaintiff, both of them are liable.

If the parent sue for himself, upon the relation of master and servant, for loss of service, the question is somewhat different.

**Suit by parent
for loss of
service.**

If the child be incapable of negligence, the question will be whether the parent's negligence contributed in the stricter sense to the misfortune; but if the child were capable of negligence, and were in fact negligent, it may be that his negligence would bar an action against another by the parent, as a master, for loss of service caused, though in part only, by the defendant's negligence¹.

The result is, that whatever particular phase a case may present, contributory negligence or an intervening agency, the question upon which the defendant's liability turns must be whether his conduct was the (or was a) proximate cause of the damage, or only a condition thereto.

¹ *Marbury Lumber Co. v. Westbrook*, 120 Alabama, 179. But compare the action for seduction, ante, p. 124. See also *Glassey v. Hestonville Ry. Co.*, 57 Penn. St. 172.

STATEMENTS OF CLAIM

STATEMENTS OF CLAIM IN TORT

THE Rules of the Supreme Court, 1883, Order XIX., Rule 5, declare: The Forms in Appendices *C*, *D*, and *E*, when applicable, and where they are not applicable Forms of the like character, as near as may be, shall be used for all pleadings; and where such Forms are applicable and sufficient, any longer Forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be. The Forms here given are taken from Appendix *C*.

DECEIT

1. Fraudulent Prospectus. (No. 13, § 6.)

1. On 31st January, 1883, the defendant issued a prospectus to the public relating to the *AB* Company, Limited.

2. On February 1st, 1883, the plaintiff received a copy of this prospectus.

3. The plaintiff subscribed for 100 shares in the company on the faith of this prospectus.

4. The prospectus contained misrepresentations, of which the following are particulars:—

(a) The prospectus stated whereas in fact

(b) The prospectus stated whereas in fact

(c) The prospectus stated whereas in fact

5. The defendant knew of the real facts as to the above particulars.

6. The following facts, which were within the knowledge of the defendant, are material, and were not stated in the prospectus:—

(a)

(b)

7. The plaintiff has paid calls to the company to the extent of £1,000. The plaintiff claims:—

- (1) Repayment of £1,000 and interest.
- (2) Indemnity.

(Signed)

Delivered

2. Fraudulent Sale of Lease. (No. 14, § 6.)

The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the 'George' public-house, Stepney, by fraudulently representing to the plaintiff that the takings of the said public-house were £40 a week, whereas in fact they were much less, to the defendant's knowledge.

Particulars of special damage:—

[Fill them in.]

The plaintiff claims £

(Signed)

Delivered

MALICIOUS PROSECUTION

3. (No. 15, § 6.)

The defendant maliciously and without reasonable and probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon, and prosecuted the plaintiff thereon at the Middlesex Quarter Sessions, where the plaintiff was acquitted.

Particulars of special damage:—

Messrs L. & L.'s bill of costs, £65.

Loss in business from January 1st, 1883, to February 18th, 1883, £100.

The plaintiff claims £500.

Place of trial,

(Signed)

Delivered

TRESPASS, CONVERSION, DETINUE

4. Possession. Mesne Profits. (No. 2, § 7.)

1. The plaintiff is entitled to the possession of Blackacre in the parish of [or, of No. 2, Bridge Street, Bristol] in the county of .

2. On or before the day of , 188 , *AB* was seised in fee and in possession of the premises.

3. On the day of , 188 , the said *AB* died so seised, whereupon—

4. The estates descended to the plaintiff, his eldest son and heir-at-law.

5. After the death of the said *AB* the defendant wrongfully took possession of the premises.

The plaintiff claims:—

(1) Possession of the premises.

(2) Mesne profits from the of .

Place of trial, .

(Signed)

Delivered

5. Possession. Cotenancy. (No. 5, § 3.)

The plaintiff is owner of 32-64th parts or shares, and master of the vessel 'Lady of the Lake,' and the defendant, who is owner of the remaining 32-64th parts, withheld possession of the said vessel from the plaintiff.

The plaintiff claims:—

(1) Possession of the said vessel.

(2) The condemnation of the defendant in all losses and damages occasioned by the defendant's withholding possession of the vessel from the plaintiff.

(Signed)

Delivered

6. Conversion. (No. 1, § 6.)

The plaintiff has suffered damage by the defendant wrongfully depriving the plaintiff of two casks of oil by refusing to give them up on demand [or, throwing them overboard out of a boat in the London Docks, &c.].

[If any special damage is claimed, add.]

Particulars [fill them in].

The plaintiff claims £100.

Place of trial, London.

(Signed)

Delivered

7. Detinue. (No. 2, § 6.)

The defendant detained from the plaintiff the plaintiff's goods and chattels, that is to say, a horse, harness, and gig.

The plaintiff claims a return of the said goods and chattels or their value, and £10 for their detention.

Place of trial, Lincolnshire.

(Signed)

Delivered

INFRINGEMENT OF PATENT, COPYRIGHT, TRADE MARK

8. Patent. (No. 6, § 6.)

The defendant has infringed the plaintiff's patent, No. 14,084, granted for the term of fourteen years, from the 21st of May, 1880, for certain improvements in the manufacture of iron and steel, whereof the plaintiff was the first inventor.

The plaintiff claims an injunction to restrain the defendant from further infringement, and £100 damages.

Particulars of breaches are delivered herewith.

Place of trial, Durham.

(Signed)

Delivered

9. Copyright. (No. 7, § 6.)

The defendant has infringed the plaintiff's copyright in a book entitled 'The History of Rome,' registered on the day of

Particulars of special damage are as follows:—

	£
Loss of sale of 50 copies	50
Loss of profit in the copyright	50
	<hr/> 100

The plaintiff claims £100.

Place of trial, Surrey.

(Signed)

Delivered

10. Trade Mark. (No. 8, § 6.)

1. The defendant has infringed the plaintiff's trade mark.

2. The trade mark is [describe it].

[If the plaintiff is not the original proprietor of the trade mark, show shortly how his title is derived.]

3. The following are the acts complained of, viz.:—

[Set them out.]

The plaintiff claims an injunction to restrain the defendant, his servants, and agents, from infringing the plaintiff's said trade mark, and in particular from [stating any particular injunction sought].

The plaintiff also claims an account or damages.

(Signed)

Delivered

SEDUCTION

11. (No. 9, § 6.)

The plaintiff has suffered damage from the seduction and carnally knowing by the defendant of *G H* the [daughter and] servant of the plaintiff.

	£	s.	d.
Loss of service from the 1st of March to the 30th of November, 1882	100	0	0
Nursing and medical attendances	10	10	0
	110	10	0

The plaintiff claims £500.

Place of trial, Berkshire.

(Signed)

Delivered

NUISANCE

12. By Smells. (No. 11, § 6.)

The plaintiff has suffered damage from offensive and pestilential smells and vapours caused by the defendant in the plaintiff's dwelling-house, No. 15, James Street, Durham.

The plaintiff claims:—

(1) £50.

(2) An injunction to restrain the defendant from the continuance or repetition of the said injury, or the committal of any injury of a like kind in respect of the same property.

Place of trial, Yorkshire, West Riding.

(Signed)

Delivered

13. By Pollution of Water. (No. 12, § 6.)

1. The plaintiff is the owner [*or lessee*] and occupier of a farm known as , through which there runs a river known as .

2. The defendant, or persons in his employ, pollute the water in the said river by passing into the same the refuse of the defendant's dye works, situate higher up the said river.

The plaintiff claims an injunction to restrain the defendant, his servants and agents, from sending from the said dye works into the said river any matter so as to pollute the waters thereof, or to render them unwholesome or unfit for use, to the injury of the plaintiff [*or as the case may be*].

The plaintiff will also claim damages in respect of the said nuisance.

Place of trial, .

(Signed)

Delivered

NEGLIGENCE

14. Personal Injury caused by Railway Company.

(No. 7, § 5.)

The plaintiff has suffered damage from the defendants' negligence in carrying the plaintiff as a passenger by railway from London to Brighton, causing personal injuries to the plaintiff, in a collision near Hayward's Heath, on the 15th January, 1882.

Particulars of expenses, &c.:—

	£	s.	d.
Loss of fifteen weeks' salary as clerk at			
£2 per week	30	0	0
Dr Smith	10	10	0
Nurse for six weeks	3	0	0
	43	10	0

The plaintiff claims £500.

Place of trial, Sussex.

(Signed)

Delivered

15. Client against Solicitor. (No. 8, § 5.)

1. The plaintiff has suffered damage from the defendant's negligence in his conduct for the plaintiff, as his solicitor, of business undertaken by the defendant on the plaintiff's retainer.

2. The negligence was in making an application under Order XIV., Rule 1, in the case of *A B* (the plaintiff) *v. C D*, where the case was one of unliquidated damages and not of debt.

Particulars of damage :—

Taxed costs paid to defendant on dismissal of summons, £ .

The plaintiff claims £ .

Place of trial, .

(Signed)

Delivered

16. Negligent Driving. (No. 3, § 6.)

The plaintiff has suffered damage from personal injuries to the plaintiff and damage to his carriage, caused by the defendant or his servant on the 15th of January, 1882, negligently driving a cart and horse in Fleet Street.

Particulars of expenses, &c. :—

	£	s.	d.
Charges of Mr Smith, surgeon	10	10	0
Charges of Mr Jones, coachmaker	14	5	6
	24	15	6

The plaintiff claims £150.

Place of trial, London.

(Signed)

Delivered

17. Lord Campbell's Act. (No. 4, § 6.)

The plaintiff, as executor of *C D*, deceased, brings this action for the benefit of Eva the widow, and William and Margaret and Dorothea the children of *C D* [as the case may be], who

have suffered damage from the defendant's negligence in carrying the said *C D* by omnibus, whereby the said *C D* was killed in Cornhill on the 15th of January, 1882.

Particulars pursuant to statute are delivered herewith.

The plaintiff claims £500.

Place of trial, London.

(Signed)

Delivered

18. Wilful Default of Executors¹. (No. 2, § 2.)

1. The plaintiff is residuary legatee of *A B*, of the city of Bath, who died March 3, 1882, having made his will dated March 2, 1882, and appointed the defendants his executors, who proved his will April 6, 1882.

2. The defendants have been guilty of wilful default in not getting in certain property of the testator.

3. The wilful default on which the plaintiff relies is as follows:—

C D owed to the testator £1,000, in respect of which no interest had been paid or acknowledgement given for five years before the testator's death. The defendants were aware of this fact, but never applied to *C D* for payment until more than a year after testator's death, whereby the said sum was lost.

The plaintiff claims:—

(1) Account of testator's personal estate on footing of wilful default.

(2) Administration of the testator's personal estate.

(Signed)

Delivered

¹ The 'wilful default' appears to be only neglect on advertence. Ante, p. 307.

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